

Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 755.

FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,
Appellant,

v.

STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

APPENDIX.

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Relevant Docket Entries.**Supreme Judicial Court for Suffolk County:**

- Aug. 2, 1966 Bill for Declaratory Relief under G.L., Chapter 30A and 231A, filed.
Aug. 2, 1966 Demurrer filed.
Aug. 2, 1966 Defendants' Answer filed.
Aug. 2, 1966 Case Stated filed.
Aug. 24, 1966 Reservation and Report as on file (Rardon, J.).
July 27, 1967 Interlocutory Decree to be entered overruling the demurrer. Final Decree to be entered in accordance with the opinion.
Aug. 9, 1967 Interlocutory Decree, as on file.
Aug. 9, 1967 Final Decree, as on file.
Oct. 13, 1967 Notice of Appeal to the Supreme Court of the United States by First Agricultural National Bank of Berkshire County filed.

Supreme Judicial Court for the Commonwealth of Massachusetts:

- July 27, 1967 Interlocutory Decree to be entered overruling the demurrer.
Final Decree to be entered in accordance with the opinion.

Rescript July 27, 1967.

Reasons as on file.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss.

IN EQUITY

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY
Plaintiff

v.

GUY J. RIZZOTTO, LEO E. DIEHL, AND DONALD T. WOOD
AS THEY ARE THE MEMBERS OF THE STATE TAX COMMISSION
Defendants

Bill for Declaratory Relief under General Laws Ch. 30A
and Ch. 231A.

To the Honorable The Justice of the Supreme Judicial Court Sitting Within and for the County of Suffolk:

Respectfully represents the Plaintiff herein that:

1. The Plaintiff, First Agricultural National Bank of Berkshires County, is a national banking association organized under 12 U.S.C., Section 21 et seq. with its principal place of business in Pittsfield, County of Berkshires, Massachusetts.

2. The Defendants, Guy J. Rizzotto, Leo E. Diehl and Donald T. Wood, are the members of the State Tax Commission of the Commonwealth of Massachusetts, duly appointed under the provisions of Chapter 14 of the General Laws.

3. On April 1, 1966, a Massachusetts retail sales tax law, as provided in Chapter 14, Acts of 1966, became effective. Section 1 of that Chapter imposes a tax on retail sales of tangible personal property. Subsection 3 of Section 1 provides that each vendor in the Commonwealth shall add to the sales price and shall collect from the purchaser

the full amount of the tax imposed by Section 1. Under Subsection 5 of the same Section, the amount of the tax collected by the vendor from the purchaser is required to be shown and charged separately from the sales price.

4. In addition, Section 2, Chapter 14, Acts of 1966, imposes a compensating use tax on the storage, use or other consumption of tangible personal property within the Commonwealth. Under Subsection 3 of Section 2, every person storing, using, or otherwise consuming in the Commonwealth tangible personal property purchased from a vendor is liable for the tax imposed by Section 2. Specifically exempted from the use tax by reason of Subsection 5 of the same Section are sales upon which taxes are imposed under Section 1 of Chapter 14, Acts of 1966.

5. There are several statutory exemptions from the retail sales tax. Two of these exemptions are provided for by Subsections 6(a) and 6(d), Section 1, Chapter 14, Acts of 1966, which provide as follows:

"Subsec. 6. The following sales and the gross receipts therefrom shall be exempt from the tax imposed by this section:

(a) Sales which the commonwealth is prohibited from taxing under the constitution or laws of the United States.

(d) Sales to the United States, the commonwealth of Massachusetts or any political subdivision thereof, or their respective agencies."

The use tax provisions of Chapter 14, Acts of 1966, also provide for specific exemptions, one of which is contained

in Subsection 5(b), Section 2, which provides in part as follows:

"Subsec. 5. The tax imposed by this section shall not apply to the following:

* * *

(b) Sales exempt from the taxes imposed under section one of this act; . . ."

6. Since April 1, 1966, the Plaintiff has paid Massachusetts sales and use taxes on purchases for its own use of tangible personal property. The Plaintiff paid Massachusetts sales taxes to its vendors on purchases during the month of April 1966 in the total amount of \$72.10, during the month of May 1966 in the total amount of \$147.04, and during the month of June 1966 in the total amount of \$356.52. Exhibit A annexed hereto is a schedule showing the total amount paid each month during April, May and June, and also showing the vendors to whom the Plaintiff paid the Massachusetts sales taxes during the month of June 1966 and the respective amounts so paid.

7. On March 28, 1966, the Plaintiff by its counsel requested a ruling or emergency regulation that national banks are exempt from Massachusetts sales and use taxes by reason of the provisions of Subsections 6(a) and 6(d), Section 1, Chapter 14, Acts of 1966. A copy of that request is annexed hereto as Exhibit B. No ruling, other than Emergency Regulation No. 6 referred to in paragraph 10, was received by the Plaintiff or its counsel pursuant to such request.

8. The State Tax Commission, of which the Defendants constitute the entire membership, is authorized to issue emergency regulations under Subsection 30, Section 1, and

Subsection 14, Section 2, Chapter 14, Acts of 1966, as it deems necessary for the administration and enforcement of the taxation, as provided under Chapter 14, Acts of 1966, of retail sales and uses of tangible personal property.

9. The Defendant, Guy J. Rizzotto, as the Commissioner of Corporations and Taxation in the Department of Corporations and Taxation, is charged with administering and enforcing the taxation by the Commonwealth of Massachusetts of retail sales of tangible personal property under Subsection 31, Section 1, Chapter 14, Acts of 1966. The Commissioner is also charged with administering and enforcing the taxation by the Commonwealth of Massachusetts of the storage, use or other consumption of tangible personal property under Subsection 14, Section 2, Chapter 14, Acts of 1966.

10. On May 31, 1966, the State Tax Commission issued Emergency Regulation No. 6 which ruled that "The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax." A copy of that regulation is annexed hereto as Exhibit C. No other regulation pertaining to the sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations has been issued. Emergency Regulation No. 6 is still in full force and effect.

11. The Plaintiff will be unable to carry on its banking operations unless it continues to make purchases which by the provisions of Emergency Regulation No. 6 are deemed to be subject to the Massachusetts sales and use tax, but which Plaintiff believes and asserts are not and cannot be subject thereto.

12. Massachusetts vendors have refused to make retail sales of tangible personal property to the Plaintiff unless the Plaintiff agrees that it will reimburse such vendors

for the Massachusetts sales tax thereon, notwithstanding Plaintiff's belief that, as a national banking association, it is not as a matter of law, responsible, directly or indirectly, for such a sales tax and that sales to national banking associations do not and cannot involve the liability of vendors or national banking associations for such a sales tax.

13. Plaintiff asserts and believes that national banking associations are exempt from the Massachusetts sales and use taxes by reason of the provisions of Subsections 6(a) and 6(d), Section 1, Chapter 14, Acts of 1966. The Plaintiff also asserts and believes that the Massachusetts sales and use tax is not one of the four methods authorized by Congress for state taxation of national banks and hence, said method of taxation is prohibited under the laws and constitution of the United States. Those methods are specified in 12 U.S.C. Section 548 which provides in part:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with. . . ."

14. There are ninety national banking associations within the Commonwealth of Massachusetts.

15. An actual controversy has arisen between the parties to this proceeding within the meaning of Section 1 of Chapter 231A of the General Laws. This controversy in-

volves important and novel issues of law relating to the interpretation of state and federal statutes as well as questions of a constitutional dimension. The resolution of these issues by declaratory relief would be a convenient means of promoting justice and avoiding burdensome and duplicating litigation.

16. The Plaintiff also seeks judicial review of Emergency Regulation No. 6 pursuant to Section 7 of Chapter 30A of the General Laws.

17. The Attorney General is being notified of this proceeding pursuant to G.L. c. 231A, §8.

WHEREFORE, the Plaintiff prays:

1. That this Court make a binding declaration under Chapter 231A of the General Laws that sales to the Plaintiff, a national banking association, are exempt from the tax imposed by Section 1, Chapter 14, Acts of 1966, under the provisions of Subsection 6(d) thereof.

2. That this Court make a binding declaration under Chapter 231A of the General Laws that sales to the Plaintiff, a national banking association, are exempt from the tax imposed by Section 1, Chapter 14, Acts of 1966, under the provisions of Subsection 6(a) thereof and because the Commonwealth of Massachusetts is prohibited from taxing such sales under the constitution or laws of the United States.

3. That this Court make a binding declaration under Chapter 231A of the General Laws that the storage, use or other consumption of tangible personal property by the Plaintiff, a national banking association, is exempt from the tax imposed by Section 2, Chapter 14, Acts of 1966, under the provisions of Subsection 5(b) thereof.

4. That this Court make a binding declaration under Chapter 231A of the General Laws that the storage, use or other consumption of tangible personal property by the

Plaintiff, a national banking association, is exempt from the tax imposed by Section 2, Chapter 14, Acts of 1966, because the Commonwealth of Massachusetts is prohibited from taxing such storage, use or other consumption under the constitution or laws of the United States.

5. That this Court make a binding declaration pursuant to Section 7, Chapter 30A of the General Laws and under Chapter 231A of the General Laws that Emergency Regulation No. 6 is invalid because it is an erroneous interpretation of the provisions of Subsections 6(a) and 6(d), Section 1, and Subsection 5(b); Section 2, Chapter 14, Acts of 1966 and because the Commonwealth of Massachusetts is prohibited from taxing such sales and uses under the constitution or laws of the United States.

6. That this Court grant such further relief as to it may seem meet and proper.

FIRST AGRICULTURAL NATIONAL BANK
OF BERKSHIRE COUNTY

By its attorneys,

ALEX J. MCFARLAND

RONALD H. KESSEL

EXHIBIT "A."

SALES TAX PAID

<u>Month</u>	<u>To Whom</u>	<u>Amount</u>
April 1966	All Vendors	\$ 72.10
May 1966	All Vendors	\$147.04
June 1966	Addressograph-Multigraph Corp.	1.00
	Allied Plumbing & Heating	.01
	American Photocopy	1.26
	Beacon Advertising Company	.24
	Berkshire Carpets	10.76

Berkshire Office Machines	13.38
Berkshire Plate Glass Company	1.80
Br&ndt Automatic Cashier Company	17.48
C. T. Brigham Co.	9.72
Burroughs Corp.	25.80
Byam Printing Co.	.25
Wm. Carter Co., of Worcester	11.69
Curtiss 1000, Inc.	17.61
Diebold, Inc.	.20
C. M. Farrell & Son, Inc.	.31
Fire Extinguisher Co.	5.62
J. C. Gerst Press, Inc.	30.79
E. P. Gowdy, Inc.	56.28
Harmon's General Store	.27
Honeywell, Inc.	1.45
International Business Machines Corp.	27.68
Isbell Electric Co.	.26
Lamb's Stationery Store	.80
Lennox & Fletcher, Inc.	.14
A. E. Martell Co., Inc.	52.40
Mass. Envelope Co.	8.50
Movie Mart	5.04
National Cash Register Co.	.71
Northern Berkshire Manufacturing Co.	.53
Photo Shop	.51
Pitney-Bowes, Inc.	5.19
Pittsfield Neon Signs	2.64
Prentice-Hall, Inc.	20.07
Recordak Company	.12
Fred Retallick & Co.	.26
Leo Samson Agency	.30
W. H. Shandoff, Inc.	6.26
Shea the Florist	.26
Slye Supply, Inc.	.65

Universal Match Co.	11.06
Walker-Clay, Inc.	5.61
Ward's Nursery, Inc.	1.61
Total for June 1966	\$356.52

EXHIBIT "B."

HERRICK, SMITH, DONALD, FARLEY & KETCHUM
 294 Washington Street
 Boston, Massachusetts 02108

[Portion of Letterhead Omitted]

March 28, 1966

State Tax Commission

80 Mason Street

Boston, Massachusetts

Dear Sirs:

We represent First Agricultural National Bank of Berkshire County, a National banking association organized under 12 U.S.C.A., Section 21, et seq. On its behalf we respectfully request a ruling that the Bank is exempt from the Massachusetts sales and use taxes under Section 1, subsection 6(d), Acts of 1966, Chapter 14, reading as follows:

"The following sales and the gross receipts therefrom shall be exempt from the tax imposed by this section:—

• • • • •

(d) Sales to the United States, the commonwealth of Massachusetts or any political subdivision thereof, or their respective agencies."

National banks are agencies of the United States. In *First National Bank of Guthrie Center v. Anderson* (1926) 269 U. S. 341, 347, the U. S. Supreme Court stated:

"National banks are not merely private moneyed institutions but *agencies of the United States* created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in accordance with the restrictions attached to its consent."

The Supreme Judicial Court of the Commonwealth has also recognized that national banks are agencies of the United States. In *Commissioner of Corporations and Taxation v. Flaherty* (1940) 306 Mass. 461, 463, the court stated:

". . . The protective power of Congress in behalf of the Federal *agencies* has been frequently employed, in instances where the full exercise of their authorized powers was threatened by various taxing statutes of the States. . . . Congress has from the inception of the present system of national banks, Act of June 3, 1864, 13 U. S. Sts. at Large, 99, 100-106, U.S.C. Title 12, § 1, Rev. Sts. § 5219, U.S.C. Title 12, § 548, expressly provided that the property and the shares of such institutions shall not be taxed in any manner different from or to an extent greater than that expressly designated."

The taxation of national banks in Massachusetts was considered by the special commission on the taxation of certain banking institutions established under the provisions of Chapter 20 of the Resolves of 1924. The commission's

final report, House Document No. 233, January, 1925, p. 10, states:

"The national banks are instrumentalities established under the federal law as fiscal agents of the government. It is, therefore, apparent that the states can impose no tax upon them or upon their shares except as permitted by the federal government."

That national banks are "agencies" of the Federal Government in the view of the highest courts of the United States and the Commonwealth and of the special commission on the taxation of certain banking institutions amply warrants, we submit, your issuance of a ruling or emergency regulation that national banks are "agencies" of the Federal Government within the meaning of Section 1, subsection 6(d), Acts of 1966, Chapter 14, a result which would be in accord with the administrative interpretation of identical language in the Connecticut sales and use tax law (Education, Welfare and Public Health Tax Act), Section 12-412(a) of which reads (Gen. Stats. Conn., Revision of 1958, sec. 12-412, p. 590):

"Taxes imposed by this chapter shall not apply to the gross receipts from the sale of and the storage, use or other consumption in this state with respect to the following items:

(a) The United States, the state or subdivisions. Sales of tangible personal property to the United States, the state of Connecticut or any of the political subdivisions thereof, or its or their *respective agencies.*"

The Connecticut ruling is contained in a letter dated April 12, 1960, from the Tax Commissioner to Commerce Clear-

ing House, Inc., and is reported in CCH Conn. #60-204.235 as follows:

"... Under the provisions of Section 12-412(a) of the General Statutes of Connecticut, Revision of 1958, sales to National Banks, and Federal Savings and Loan Associations are tax exempt. National Banks and Federal Savings and Loan Associations are deemed instrumentalities of the Federal Government for tax purposes.

This exemption does not apply to banks chartered only by the State of Connecticut nor to State Savings and Loan Associations."

We further submit that, in any event, a ruling from your office is warranted that national banks, and thus First Agricultural National Bank of Berkshire County, is exempt from the Massachusetts sales and use taxes under Section 1, subsection 6(a), Acts of 1966, Chapter 14, reading as follows:

"The following sales and gross receipts therefrom shall be exempt from the tax imposed by this section:—

(a) Sales which the commonwealth is prohibited from taxing under the constitution or laws of the United States."

Congress has authorized state taxation of national banks only by any one of four specified methods (in addition to taxes on their real estate), in 12 U.S.C.A., Section 548, R.S. Section 5219. The fourth method which is adopted in Massachusetts in G. L. c. 63, Section 2, is "according to or measured by their net income." 12 U.S.C.A., Section 548, as amended to date, provides in part:

"The legislature of each State may determine and direct, subject to the provisions of this section, the

manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with . . .”

It will be noted that neither a sales tax nor a use tax is one of the four methods of taxation permitted by 12 U.S.C.A., Section 548.

Inasmuch as national banks, by reason of the provisions of 12 U.S.C.A., Section 548, R.S., Section 5219, may not be taxed except as specifically provided thereunder, and inasmuch as the legal incidence of the Massachusetts sales and use tax is on the vendee (and thus would fall on a national bank as a purchaser or user), the Massachusetts sales and use tax is unconstitutional and contrary to federal law if applied to a national bank.

Your early consideration of this request for a ruling will be greatly appreciated.

Very truly yours,

AJM: hgc

ALEX J. MCFARLAND

EXHIBIT “C.”

MASSACHUSETTS SALES AND USE TAX EMERGENCY REGULATIONS

EMERGENCY REGULATION No. 6

National Banks—Federal Savings and Loan Associations

The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax.

National banks and Federal savings and loan associations making sales of tangible personal property must collect the sales tax to the same extent as other vendors making such sales.

STATE TAX COMMISSION

Guy J. Rizzotto, Chairman

Leo E. Diehl

Donald T. Wood

May 31, 1966

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

SUFFOLK, SS.

IN EQUITY

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY
Plaintiff

v.

GUY J. RIZZOTTO, LEO E. DIEHL, AND DONALD T. WOOD
AS THEY ARE THE MEMBERS OF THE STATE TAX COMMISSION
Defendants

Demurrer.

Now come the defendants in the above-entitled case and demur to the plaintiff's bill assigning as ground of said demurrer that under St. 1966, c. 14, § 1, subsections 20-22 and § 2, subsection 11, this Court does not have jurisdiction of this cause.

By their attorney,

EDWARD W. BROOKE

Attorney General

By DAVID BERMAN

Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss.

IN EQUITY

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY
Plaintiff

v.

GUY J. RIZZOTTO, LEO E. DIEHL, AND DONALD T. WOOD
AS THEY ARE THE MEMBERS OF THE STATE TAX COMMISSION
Defendants

Defendants' Answer.

Now come the defendants and, not waiving their demur-
rer but specifically relying thereon, answer as follows to the
plaintiff's bill for declaratory relief:

1. The defendants admit all of the allegations of Paragraphs 1, 2, 6, 7, 10, 11, 12, 14 and 17.
2. The defendants say that all of the allegations of Paragraphs 3, 4, 5, 8, 9 and 16 are statements of law.
3. Answering Paragraph 13 of the plaintiff's bill, the defendants admit that the plaintiff asserts and believes that national banking associations are exempt from the Massachusetts sales and use taxes and that the Massachusetts sales and use tax is not a method authorized by Congress for state taxation of national banks; the defendants say, however, that both of the propositions as stated in Paragraph 13 and so asserted and believed by the plaintiff are statements of law which the defendants neither admit nor deny. The defendants further say that the last sentence of Paragraph 13 including the quoted material at the end of said paragraph also constitutes a statement of law.

4. The defendants admit the allegation of the final sentence of Paragraph 15 and further admit that the plaintiff

and the defendants are in disagreement as to the proper interpretation of certain parts of St. 1966, c. 14. As to the allegation of Paragraph 15 not herein admitted, the defendants say that they are statements of law.

EDWARD W. BROOKE

Attorney General

By DAVID BERMAN

Assistant Attorney General

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS.

IN EQUITY

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY
Plaintiff

v.

GUY J. RIZZOTTO, LEO E. DIEHL, AND DONALD T. WOOD
AS THEY ARE THE MEMBERS OF THE STATE TAX COMMISSION
Defendants.

Case Stated.

This case stated, including the exhibits, presents all the material facts on which the parties' respective rights depend. The facts herein stated are agreed upon for the purpose of the instant cause only, and are not otherwise admissions by any party. In agreeing to this case stated, the Defendants do not waive any of their defenses to the Plaintiff's bill.

1. The Plaintiff, First Agricultural National Bank of Berkshire County, is a national banking association organized under 12 U.S.C., Section 21 et seq. with its principal

place of business in Pittsfield, County of Berkshire, Massachusetts.

2. The Defendants, Guy J. Rizzotto, Leo E. Diehl and Donald T. Wood, are the members of the State Tax Commission of the Commonwealth of Massachusetts, duly appointed under the provisions of Chapter 14 of the General Laws.

3. Since April 1, 1966, the Plaintiff has paid Massachusetts sales and use taxes on purchases for its own use of tangible personal property. The Plaintiff paid Massachusetts sales taxes to its vendors on purchases during the month of April 1966 in the total amount of \$72.10, during the month of May 1966 in the total amount of \$147.04, and during the month of June 1966 in the total amount of \$356.52. Exhibit A annexed hereto is a schedule showing the total amount paid each month during April, May and June, and also showing the vendors to whom the Plaintiff paid the Massachusetts sales taxes during the month of June 1966 and the respective amounts so paid.

4. On March 28, 1966, the Plaintiff by its counsel requested a ruling or emergency regulation that national banks are exempt from Massachusetts sales and use taxes by reason of the provisions of Subsections 6(a) and 6(d), Section 1, Chapter 14, Acts of 1966. A copy of that request is annexed hereto as Exhibit B. No ruling was received by the Plaintiff or its counsel pursuant to such request.

5. On May 31, 1966, however, the State Tax Commission issued Emergency Regulation No. 6 which ruled that "The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax." A copy of that regulation is annexed hereto as Exhibit C. No other regulation pertaining to the sale, lease or rental of tangible personal property to national banks and Federal savings and loan

associations has been issued. Emergency Regulation No. 6 is still in full force and effect.

6. The Plaintiff will be unable to carry on its banking operations unless it continues to make purchases which by the provisions of Emergency Regulation No. 6 are deemed to be subject to the Massachusetts sales and use tax.

7. Massachusetts vendors have refused to make retail sales of tangible personal property to the Plaintiff unless the Plaintiff agrees that it will reimburse such vendors for the Massachusetts sales tax thereon. An example of such a refusal is contained in an exchange of letters of which copies are annexed hereto as Exhibits D, E and F.

8. There are ninety national banking associations within the Commonwealth of Massachusetts.

9. The Attorney General has been notified of this proceeding pursuant to G.L. c. 231A, § 8.

RONALD H. KESSEL

Attorney for the Plaintiff

DAVID BERMAN, AAG

Attorney for the Defendants

EXHIBIT "A."

SALES TAX PAID

<i>Month</i>	<i>To Whom</i>	<i>Amount</i>
April 1966	All Vendors	\$ 72.10
May 1966	All Vendors	\$147.04
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	American Photocopy	1.26
	Beacon Advertising Company	.24
	Berkshire Carpets	10.76

Berkshire Office Machines	13.38
Berkshire Plate Glass Company	1.80
Brandt Automatic Cashier Company	17.48
C. T. Brigham Co.	9.72
Burroughs Corp.	25.80
Byam Printing Co.	.25
Wm. Carter Co. of Worcester	11.69
Curtiss 1000, Inc.	17.61
Diebold, Inc.	.20
C. M. Farrell & Son, Inc.	.31
Fire Extinguisher Co.	5.62
J. C. Gerst Press, Inc.	30.79
E. P. Gowdy, Inc.	56.28
Harmon's General Store	.27
Honeywell, Inc.	1.45
International Business Machines Corp.	27.68
Isbell Electric Co.	.26
Lamb's Stationery Store	.80
Lennox & Fletcher, Inc.	.14
A. E. Martell Co., Inc.	52.40
Mass. Envelope Co.	8.50
Movie Mart	5.04
National Cash Register Co.	.71
Northern Berkshires Manufacturing Co.	.53
Photo Shop	.51
Pitney-Bowes, Inc.	5.19
Pittsfield Neon Signs	.2.64
Prentice-Hall, Inc.	20.07
Recordak Company	.12
Fred Retallick & Co.	.26
Leo Samson Agency	.30
W. H. Shandoff, Inc.	6.26
Shea the Florist	.26
Slye Supply, Inc.	.65

Universal Match Co.	11.06
Walker-Clay, Inc.	5.61
Ward's Nursery, Inc.	1.61
Total for June 1966	\$356.52

EXHIBIT "B."

HERRICK, SMITH, DONALD, FARLEY & KETCHUM
 294 Washington Street
 Boston, Massachusetts 02108

[Portion of Letterhead Omitted] *

March 28, 1966

State Tax Commission

80 Mason Street
 Boston, Massachusetts

Dear Sirs:

We represent First Agricultural National Bank of Berkshire County, a National banking association organized under 12 U.S.C.A., Section 21 et seq. On its behalf we respectfully request a ruling that the Bank is exempt from the Massachusetts sales and use taxes under Section 1, subsection 6(d), Acts of 1966, Chapter 14, reading as follows:

“The following sales and the gross receipts therefrom shall be exempt from the tax imposed by this section:—

(d) Sales to the United States, the commonwealth of Massachusetts or any political subdivision thereof, *or their respective agencies.*”

National banks are agencies of the United States. In *First National Bank of Guthrie Center v. Anderson* (1926) 269 U. S. 341, 347, the U. S. Supreme Court stated:

"National banks are not merely private moneyed institutions but *agencies of the United States* created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in accordance with the restrictions attached to its consent."

The Supreme Judicial Court of the Commonwealth has also recognized that national banks are agencies of the United States. In *Commissioner of Corporations and Taxation v. Flaherty* (1940) 306 Mass. 461, 463, the court stated:

"... The protective power of Congress in behalf of Federal *agencies* has been frequently employed in instances where the full exercise of their authorized powers was threatened by various taxing statutes of the States. . . . Congress has from the inception of the present system of national banks, Act of June 3, 1864, 13 U. S. Sts. at Large, 99, 100-106, U.S.C. Title 12, § 1, Rev. Sts. § 5219, U.S.C. Title 12, § 548, expressly provided that the property and the shares of such institutions shall not be taxed in any manner different from or to an extent greater than that expressly designated."

The taxation of national banks in Massachusetts was considered by the special commission on the taxation of certain banking institutions established under the provisions of Chapter 20 of the Resolves of 1924. The commission's final

report, House Document No. 233, January, 1925, p. 10, states:

"The national banks are instrumentalities established under the federal law as fiscal agents of the government. It is, therefore, apparent that the states can impose no tax upon them or upon their shares except as permitted by the federal government."

That national banks are "agencies" of the Federal Government in the view of the highest courts of the United States and the Commonwealth and of the special commission on the taxation of certain banking institutions amply warrants, we submit, your issuance of a ruling or emergency regulation that national banks are "agencies" of the Federal Government within the meaning of Section 1, subsection 6(d), Acts of 1966, Chapter 14, a result which would be in accord with the administrative interpretation of identical language in the Connecticut sales and use tax law (Education, Welfare and Public Health Tax Act), Section 12-412(a) of which reads (Gen. Stats. Conn., Revision of 1958, sec. 12-412, p. 590):

"Taxes imposed by this chapter shall not apply to the gross receipts from the sale of and the storage, use or other consumption in this state with respect to the following items:

- (a) The United States, the state or subdivisions. Sales of tangible personal property to the United States, the state of Connecticut or any of the political subdivisions thereof, or its or their *respective agencies.*"

The Connecticut ruling is contained in a letter dated April 12, 1960, from the Tax Commissioner to Commerce Clear-

ing House, Inc., and is reported in CCH Conn. #60-204.235 as follows:

"... Under the provisions of Section 12-412(a) of the General Statutes of Connecticut, Revision of 1958, sales to National Banks, and Federal Savings and Loan Associations are tax exempt. National Banks and Federal Savings and Loan Associations are deemed instrumentalities of the Federal Government for tax purposes.

This exemption does not apply to banks chartered only by the State of Connecticut nor to State Savings and Loan Associations."

We further submit that, in any event, a ruling from your office is warranted that national banks, and thus First Agricultural National Bank of Berkshire County, is exempt from the Massachusetts sales and use taxes under Section 1, subsection 6(a), Acts of 1966, Chapter 14, reading as follows:

"The following sales and gross receipts therefrom shall be exempt from the tax imposed by this section:

(a) Sales which the commonwealth is prohibited from taxing under the constitution or laws of the United States."

Congress has authorized state taxation of national banks only by any one of four specified methods (in addition to taxes on their real estate), in 12 U.S.C.A., Section 548, R.S. Section 5219. The fourth method which is adopted in Massachusetts in G. L. c. 63, Section 2, is "according to or measured by their net income." 12 U.S.C.A., Section 548, as amended to date, provides in part:

"The legislature of each State may determine and direct, subject to the provisions of this section, the

manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with . . ."

It will be noted that neither a sales tax nor a use tax is one of the four methods of taxation permitted by 12 U.S.C.A., Section 548.

Inasmuch as national banks, by reason of the provisions of 12 U.S.C.A., Section 548, R.S., Section 5219, may not be taxed except as specifically provided thereunder, and inasmuch as the legal incidence of the Massachusetts sales and use tax is on the vendee (and thus would fall on a national bank as a purchaser or user), the Massachusetts sales and use tax is unconstitutional and contrary to federal law if applied to a national bank.

Your early consideration of this request for a ruling will be greatly appreciated.

Very truly yours,
ALEX J. McFARLAND

AJM:hgc

EXHIBIT "C."**MASSACHUSETTS SALES AND USE TAX EMERGENCY
REGULATIONS****EMERGENCY REGULATION No. 6*****National Banks—Federal Savings and Loan Associations***

The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax.

National banks and Federal savings and loan associations making sales of tangible personal property must collect the sales tax to the same extent as other vendors making such sales.

STATE TAX COMMISSION

Guy J. Rizzotto, Chairman

Leo E. Diehl

Donald T. Wood

May 31, 1966

A true copy

Attest:

Neil P. Shea

Executive Assistant

Massachusetts State Tax Commission

EXHIBIT "D."

July 25, 1966

W. H. Shandoff, Incorporated
146 North Street
Pittsfield, Massachusetts 01201

Gentlemen:

We are holding up payment of your invoice dated July 22, 1966 for \$343.46 covering the purchase of the following items:

1 #337 Cole tab file	1 Model C-20 desk dispenser
1 #121 tan file	6 #68-989 binders
1 file and replacing base	6 Boxes Scripto refills
1 #501 Bates list finder	1 Box 5 x 7 index cards
1 Star type cleaner	1 Two door #6112 file
1 Air mail labels	2 Check drawers
1 Waste basket	

We are of the view that a retail sale consummated pursuant to this purchase order is not subject to the recently enacted Massachusetts sales tax. It is our opinion that purchases by the First Agricultural National Bank of Berkshire County, a national banking association, are exempt from the tax because the bank is an agency of the federal government. We also believe that the imposition and collection of such a tax would be unconstitutional.

For these reasons, we believe that you should not collect a Massachusetts sales tax for this purchase and those we may make in the future.

Sincerely yours,
Gardner L. Brown
President

GLB/s

EXHIBIT "E."

W. H. SHANDOFF, INCORPORATED

[Portion of Letterhead Omitted]

July 27, 1966

Gardner L. Brown, President

First Agricultural National Bank of Berkshire County
100 North Street
Pittsfield, Massachusetts

Dear Sir:

We are in receipt of your letter dated July 25th advising that you intend to hold up payment of our invoice dated July 22nd, 1966 in the amount of \$343.46 as you feel that purchases made by the First Agricultural National Bank should not be subject to a Massachusetts Sales Tax.

We have carefully considered your request for exemption but must ask that you pay the full amount of this invoice including sales tax in the absence of a ruling or decision stating that you are exempt.

We would also appreciate knowing what position you intend to take on any future orders we might receive from you.

Yours very truly,

JOHN F. PIXLEY

John F. Pixley, Mgr.

jfp/mra

EXHIBIT "F."

July 27, 1966

W. H. Shandoff, Incorporated
146 North Street
Pittsfield, Massachusetts 01201

Gentlemen:

We have received your letter of July 26, 1966 and are, of course, disappointed with the position you have taken. Since the items which we purchased are necessary for our banking operations we can not return them but we will pay under protest the amount of the Massachusetts sales tax which you have added to the invoice price. This will also be true of any future purchases we may make.

Our Accounting Department has been instructed to issue a check in payment.

Sincerely yours,

GARDNER L. BROWN

President

GLB/s

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, SS.

IN EQUITY
69316

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY
Plaintiff

v.

GUY J. RIZZOTTO, LEO E. DIEHL, AND DONALD T. WOOD
AS THEY ARE THE MEMBERS OF THE STATE TAX COMMISSION
Defendants

Reservation and Report.

The parties hereto having filed an agreed statement of all the material facts, constituting a case stated, and it appearing that there are involved proper questions of law which ought to be determined by the full court of the Supreme Judicial Court, and counsel for both parties having requested this court to report the same, it is hereby ordered that the above case be reserved and reported without decision to the full court of the Supreme Judicial Court for its determination and judgment or order upon the bill for declaratory relief, defendants' demurrer thereto, defendants' answer, and the agreed statement of facts constituting a case stated.

PAUL C. REARDON

August 24, 1966 Justice of the Supreme Judicial Court

Assented to:

RONALD H. KESSEL

Attorney for Plaintiff

DAVID BERMAN

Assistant Attorney General

Attorney for Defendants

**Opinion and Concurring Opinion of Supreme Judicial Court
for the Commonwealth of Massachusetts.**

**FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE
COUNTY vs. STATE TAX COMMISSION.**

REARDON, J. This is a bill for declaratory relief under G. L. c. 231A and c. 30A, § 7, which came first before a single justice. The plaintiff, a national bank, seeks a binding declaration that it is exempt from the recently enacted Massachusetts sales and use tax, St. 1966, c. 14, §§ 1 and 2 (Act). Judicial review is also sought of emergency regulation No. 6 issued by the defendant State Tax Commission (Commission). The Commission demurred to the bill and, without waiving its demurrer, filed an answer. The parties have filed a statement of agreed facts constituting a case stated. The matter was reserved and reported without decision by the single justice.

The plaintiff is a national banking association organized under 12 U. S. C. § 21, et seq. (1964), with its principal place of business in Pittsfield. It is one of ninety national banking associations within Massachusetts. Since April 1, 1966, the plaintiff has paid sales and use taxes to its vendors on purchases of tangible personal property within the Commonwealth. The amount of these taxes totaled \$575.66 during the period from April 1, 1966, to June 30, 1966. On March 28, 1966, the plaintiff requested from the Commission a ruling or emergency regulation that national banks are exempt from Massachusetts sales and use taxes. No ruling was received by the plaintiff pursuant to its request. The Commission on May 31, 1966, issued emergency regulation No. 6, which ruled that "[t]he sale, lease, or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax."¹ This regulation remains in full force and effect.

¹ Emergency regulation No. 6 also states, "National banks and Federal savings and loan associations making sales of tangible per-

No other regulation pertaining to the sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations has been issued. The plaintiff will be unable to carry on its banking operations unless it continues to make purchases which by the provisions of emergency regulation No. 6 are deemed to be subject to the Massachusetts sales and use tax. Massachusetts vendors have refused to make retail sales of tangible personal property to the plaintiff unless it agrees to reimburse such vendors for the Massachusetts sales tax thereon.

I. THE COMMISSION'S DEMURRER.

We first deal with the Commission's demurrer which is based on the ground that the Act provides an exclusive remedy by which the question of sales tax liability may be raised. While § 1, subsection 22, provides that the tax abatement remedy encompassed by subsections 20-22 shall be "exclusive,"² it contains no reference as to the proper mode of review of regulations issued by the Commission. Lacking an exclusive mode of review, judicial review of any regulation by a suit for declaratory relief is authorized by G. L. c. 30A, § 7. See *Westland Housing Corp. v. Commissioner of Ins.* Mass. , . The Commission apparently issued emergency regulation No. 6 pursuant to its regulation making authority. G. L. c. 14, § 4. Emergency regulation No. 6 also constitutes a "regulation" within the meaning of G. L. c. 30A, § 1 (5). See Curran & Sacks, The

² Mass. Adv. Sh. (1967) 655, 661.

sonal property must collect the sales tax to the same extent as other vendors making such sales." We do not consider this portion of the regulation even though the plaintiff alludes to it several times in its brief. Neither the allegations of the bill nor the facts constituting a case stated raise the question of the applicability of the Act to sales made by national banks to its customers.

² See also § 2, subsection 11.

Massachusetts Administrative Procedure Act, 37 B. U. L. Rev. 70, 77-78. Our jurisdiction extends, at the least, to a review of the validity of emergency regulation No. 6. Curran & Sacks, *supra*, at 84. That regulation places in controversy the plaintiff's claim that it is exempt from the taxes imposed by the Act under subsections 6 (a) and 6 (d) of § 1, subsection 5 (b) of § 2, and under the Constitution and laws of the United States. The Commission's demur-
rer should be overruled.

The issue thus presented for our determination is whether the sales and use tax imposed by the Act can be applied to purchases made by the plaintiff and other national banks doing business in the Commonwealth.

II. STATUTORY EXEMPTION.

Sales and use taxes.

Section 1, subsection 6 (d), exempts "[s]ales to the United States, the commonwealth of Massachusetts or any political subdivision thereof, or their respective agencies."³ The plaintiff purports to be an "agency" of the United States and, therefore, exempt from the sales and use taxes. A statute granting an exemption must be strictly construed. "The burden of proof is upon the one claiming the exemption to show clearly and unequivocally that he comes within the terms of the exemption." *Milton v. Ladd*, 348 Mass. 762, 765, and cases cited. Consideration may be given to the interpretation of the Act expressed by emergency regulation No. 6 and other administrative regulations contemporaneous with the enactment of the law. See *Cleary v. Cardullo's Inc.* 347 Mass. 337, 343, and cases cited.

³ Section 2, subsection 5 (b), provides that the use tax provisions shall not apply to sales exempt from the taxes imposed under § 1 of the Act.

Without question, as contended by the plaintiff, national banks are subject to certain supervision by the Federal government. The same may be said of railroads, airlines, commercial carriers of mail, radio stations, and many other private concerns which enter into relationships with the government of the United States and perform governmental services. That they do so does not in and of itself make them "agencies" of the United States. A national bank is essentially a privately owned corporation, privately managed and operated in the interest of its stockholders. Whatever role a national bank has in furthering the fiscal policies of the Federal government is incidental to its primary purpose of returning profit to its stockholders. See *National Labor Relations Bd. v. Bank of America Natl. Trust & Sav. Assn.* 130 F. 2d 624, 627 (9th Cir.). "Instrumentalities like the national bank . . . , in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest." *Emergency Fleet Corp., United States Shipping Bd. v. Western Union Tel. Co.* 275 U.S. 415, 425-426.⁴ Their status as private corporations will be more thoroughly explored below.⁵

In our view the Legislature intended "agency" to mean either a regularly constituted department of government or

⁴ "The government need not perform all its functions by the use of its property and the activity of its officers, but may establish agencies to these ends. Such an agency, created not for private gain but wholly devoted to governmental purposes and wholly owned by the United States, is as free from state taxation on its property and its activities as the government itself. . . . In the exertion of the powers conferred upon it by the Constitution, the United States may, in its discretion, erect corporations for private gain and employ them as its instrumentalities." *James, State Tax Commr. v. Dravo Contr. Co.* 302 U. S. 134, 163 (Roberts, J. dissenting).

⁵ We reserve also for later discussion various judicial utterances that have characterized national banks as "agencies" or instru-

an entity which is wholly owned by the government and which exercises exclusively governmental functions. At best, the plaintiff is a creature of the United States and not entitled to an exemption as an "agency" of the United States. We therefore hold that purchases made by the plaintiff national bank are not exempt by virtue of either subsection 6 (d) of § 1 or subsection 5 (b) of § 2 of the Act as sales to an "agency" of the United States.

III. CONSTITUTIONAL EXEMPTIONS.

A. Sales tax.

Since the plaintiff is not exempted under the terms of subsection 6 (d) of § 1 of the Act, can there be exemption in its favor under subsection 6 (a)? That provision exempts from the imposition of the sales tax "[s]ales which the commonwealth is prohibited from taxing under the constitution and laws of the United States."

The Commission contends that the sales tax is not imposed upon the purchaser, as alleged by the plaintiff, but rather is a tax upon the vendors who sell tangible personal property to the plaintiff. If the tax does fall on the vendor, that the economic burden of the tax may be passed on by the vendor to the plaintiff offends neither the sovereign immunity of the United States nor the laws of the United States relative to State taxation of national banks. *Western Lithograph Co. v. State Bd. of Equalization*, 11 Cal. 2d 156. *National Bank of Hyde Park v. Isaacs, Director of Rev.* 27 Ill. 2d 205. *Federal Reserve Bank v. Department*

mentalities of the Federal government. See, e.g., *Owensboro Natl. Bank v. Owensboro*, 173 U. S. 664, 667-668; *First Natl. Bank v. Hartford*, 273 U. S. 548, 550; *Providence Inst. for Sav. v. Boston*, 101 Mass. 575, 584; *Central Natl. Bank v. Lynn*, 259 Mass. 1, 7-8; *Commissioner of Corps. & Taxn. v. Woburn Natl. Bank*, 315 Mass. 505, 506; *Squantum Gardens, Inc. v. Assessors of Quincy*, 335 Mass. 440, 444.

of Rev. 339 Mich. 587. *National Bank v. Department of Rev.* 340 Mich. 573, app. dism. 349 U. S. 934. See *Alabama v. King & Boozer*, 314 U. S. 1, 8-9. Any exemption the plaintiff may claim under subsection 6 (a) will be controlled by whether the purchaser or the vendor bears the legal incidence of the Massachusetts sales and use taxes. *Alabama v. King & Boozer*, 314 U. S. 1. *Curry, Commr. of Rev. of Alabama, v. United States*, 314 U. S. 14. *Kern-Limerick, Inc. v. Scurlock, Commr. of Rev. for Arkansas*, 347 U. S. 110, 121-122.

The legal incidence of a tax has been held by the Supreme Court of the United States to be determined by "who is responsible . . . for payment to the state of the exaction." *Kern-Limerick, Inc. v. Scurlock, Commr. of Rev. for Arkansas*, 347 U. S. 110, 121-122. This determination is not always easy because of the similarities existing generally in the structure of State sales taxes regardless of whether the legal incidence of the tax is imposed upon the vendor⁶ or upon the purchaser.⁷ The economic burden of the tax is almost universally passed along to the purchaser although practical considerations necessitate its collection and remission to the State by the vendor. Notwithstanding these ambiguous aspects inhering generally in sales taxes, we confront the question of which party the General Court intended should bear the legal incidence or ultimate burden of the tax.

⁶ In States in which the legal incidence of the tax is imposed upon the vendor, the legal basis of the tax is "for the privilege of engaging in such business" (see, e.g., Mich. Compiled Laws, 1948, § 205.52), or is a "Retailers' Occupation Tax" (see, e.g., Ill. Rev. Sts., 1965, c. 120, § 440).

⁷ See Ohio Rev. Code & Serv., c. 5739.03. See also 36 Maine Rev. Sts. Anno., § 1753: "The liability for, or the incidence of, the tax on tangible personal property provided by . . . [the sales and use tax] is declared to be a levy on the consumer."

Our Act is neither a vendor tax nor a purchaser tax but a hybrid tax containing elements of both vendor and purchaser taxes. See Dane, *The New Sales and Use Tax Law*, 51 Mass. L. Q. 239, 246-249. The tax is in part a levy on the vendor for the privilege of selling at retail.⁸ The liability for the sales tax is based on three per cent of a vendor's "gross receipts" from all retail sales of tangible personal property rather than the amount of taxes actually collected from purchasers.⁹ St. 1966, c. 14, § 1, subsection 2. Worthy of specific note is the liability of the vendor to make return of the tax to the Commonwealth for gross sales made by him of items where individual sales do not exceed eighteen cents.¹⁰ § 1, subsections 2 and 4. On such items the purchaser does not reimburse the vendor for any tax whatsoever. The responsibility for payment to the Commonwealth is exclusively upon the vendor.¹¹ He is the

⁸ Statute 1966, c. 14, § 1, subsection 7 (a), provides that "[n]o person shall do business in this commonwealth as a vendor unless a registration . . . shall have been issued to him." A vendor's failure to comply with the requirements of the statute may result in the revocation of his registration. § 1, subsection 7 (c).

⁹ Most States have held this to be true even though disparities occur due to a bracket collection system similar to that contained in § 1, subsection 4. *De Aryan v. Akers*, 12 Cal. 2d 781. *Stevens Enterprises, Inc. v. The State Commn. of Rev. & Taxn. of the State of Kansas*, 179 Kans. 696. *W. S. Libbey Co. v. Johnson, State Tax Assessor*, 148 Maine, 410. *Piedmont Canteen Serv. Inc. v. Johnson, Commr. of Rev.* 256 N. C. 155. *F. W. Woolworth Co. v. Gray*, 77 N. D. 757. *Smoky Mountain Canteen Co. v. Kizer, Commr. of Fin. & Taxn.* 247 S. W. 2d 69 (Tenn.). *White v. Washington*, 49 Wash. 2d 718.

¹⁰ But see § 1, subsection 6 (t), exempting under certain conditions sales of tangible personal property through coin operated vending machines, the cost of which does not exceed ten cents.

¹¹ But see, as an exception, St. 1966, c. 483, amending St. 1966, c. 14, § 1, subsection 3, which provides that the sales tax on motor vehicles and trailers be paid by the purchaser to the registrar of motor vehicles rather than to the vendor.

"taxpayer" or person required to make returns and to pay the tax to the Commonwealth. See St. 1966, c. 14, § 1, subsections 9 and 10. See also § 1, subsection 17. The assessment and collection of unpaid taxes through both criminal and civil remedies may be made only against the vendor. § 1, subsections 15-19. Likewise, the tax abatement procedures provided by § 1, subsections 20-22, are applicable only to vendors.¹² Chapter 14, § 1, makes no provision permitting the Commonwealth to enforce the payment of the sales tax against a purchaser. Cf. N. Y. Consol. Laws, c. 59, § 1133; Ohio Rev. Code & Serv. § 5739.13.

The liability initially laid upon the vendor to remit the tax to the Commonwealth does not of necessity require the conclusion that the legal incidence of the tax is imposed upon him. A sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. See *Federal Land Bank v. Bismarck Lumber Co.* 314 U. S. 95, 99. See also *Alabama v. King & Boozer*, 314 U. S. 1, 9-10. The plaintiff argues that by virtue of § 1, subsections 3 and 23 of the Act, it bears the legal incidence of the tax. Subsection 3 provides that "each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section."¹³ Subsection 23 prohibits as unlawful advertising the holding out by any vendor that he will assume or absorb the tax on any sale that he may make. However, neither subsection 3 nor 23, singly

¹²For purposes of the use tax imposed by § 2, the assessment, collection, and abatement provisions of § 1 are applicable to purchasers. § 2, subsection 11.

¹³Section 1, subsection 4, contains a bracket system to facilitate collection of the tax from the purchaser. The statute also requires that the amount of the tax "shall be stated and charged separately from the sales price." § 1, subsection 5. See also § 1, subsection 1 (14) (c) (iv).

or together, imposes any sanction on a vendor who chooses not to charge the tax. His liability to the State remains at three per cent of his gross receipts whether or not he chooses to collect the tax from his purchasers.¹⁴ The Commonwealth can proceed only against him for the collection of unpaid taxes. We are of the opinion that subsections 3 and 23 fall short of shifting the legal liability, or incidence, of the tax placed initially on the vendor to the purchaser.

There is no necessary inconsistency between imposing the legal incidence of a tax upon the vendor, yet recognizing a statutory right in the vendor to shift the tax to the purchaser. See Mich. Compiled Laws, 1948, § 205.73, as amended by PA 1949, No. 272 (Stat. Anno. 1950 Rev. § 7.544), construed in *National Bank v. Department of Rev.* 334 Mich. 132, 137. See also *Federal Reserve Bank v. Department of Rev.* 339 Mich. 587; *National Bank v. Department of Rev.* 340 Mich. 573, app. dism. 349 U. S. 934. The thrust of these cases is that the Michigan sales tax is upon the vendor notwithstanding the intent of the Legislature that the economic burden of the tax was to be passed on to the consumer and that such a requirement was imposed by administrative regulation. *National Bank v. Department of Rev.* 334 Mich. 132, 137.

We think our Act is clearly distinguishable from the North Dakota sales tax, urged by the plaintiff as "strikingly similar," reviewed by the Supreme Court of the United States in *Federal Land Bank v. Bismarck Lumber*

¹⁴ We believe that these subsections are aimed more at the cultivation of a happy relationship between the vendors and customers than at any mandate that the taxes be collected from the purchaser. The vendor at his option may add the tax to his selling price without being accused of a price increase. At the same time, the small vendor is not put at a competitive disadvantage with larger retailers who conceivably could increase their business volume by advertising a willingness to absorb the tax. See Dane, *The New Sales and Use Tax Law*, 51 Mass. L. Q. 239, 248.

Co. 314 U. S. 95.¹⁵ That statute punished a vendor's failure to collect the tax as a misdemeanor. See N. D. Century Code (Anno.) § 57-39-16 (5). The plaintiff's reliance on *Alabama v. King & Boozer*, 314 U. S. 1, 7, is misplaced for the same reason. The Alabama sales tax statute reviewed in that decision made a vendor criminally liable if he failed or refused to collect the tax from the purchaser. Alabama Code, 1940, Tit. 51, § 776. Other decisions cited by the plaintiff, see, e.g., *Avco Mfg. Corp. v. Connelly*, 145 Conn. 161, that have relied on cases such as *Federal Land Bank v. Bismarck Lumber Co.* and *Alabama v. King & Boozer* to impose the legal incidence of the tax upon the purchaser, are equally unhelpful. Nor do we agree with *Liberty Natl. Bank & Trust Co. v. Buscaglia*, 26 App. Div. 2d (N. Y.) 97. That decision is in conflict with a later case, *Pierce v. State Tax Commn.* 52 Misc. 2d (N. Y.) 10, 13, which indicates, contrary to the conclusion reached in the *Buscaglia* decision, that the incidence of the New York State sales tax is upon the vendor.

We conclude that the incidence of the sales tax is upon the vendor. The plaintiff, therefore, is not entitled to an exemption under § 1, subsection 6 (a) of the Act. See cases cited, *supra*, at p. . . .

B. Use tax.

The exemption in § 1, subsection 6 (a), for "[s]ales which the commonwealth is prohibited from taxing under the constitution or laws of the United States" is applicable also to the use tax. § 2, subsection 5 (b). In contrast to the sales tax, there is no doubt that the incidence of the use

¹⁵ There, at p. 99, the court stated: "It is clear that the North Dakota statute makes the purchaser . . . liable for the sales tax. Section 6 of the Act requires the retailer to add the tax to the sales price and declares the tax to be a debt from the consumer to the retailer. Section 7 makes it unlawful for the retailer to hold out that he will absorb or refund the tax in whole or in part."

tax is upon the purchaser. The three per cent tax, designed to prevent the loss of sales tax revenue by out of State purchases, is imposed upon the storage, use or other consumption of tangible personal property within the Commonwealth. § 2, subsection 2. The purchaser or "user" is liable for the tax. § 2, subsection 3. It is his obligation to file a return and pay the tax. § 2, subsections 10 (a), 10 (c).¹⁶ The provisions contained in § 1, subsections 15-22, relating to the assessment, collection, and abatement of the sales tax, are expressly applied to purchasers liable for payment of the use tax. § 2, subsection 11.

Our conclusion that the incidence of the use tax is upon the purchaser raises the question whether the Constitution and laws of the United States permit such a tax to be imposed upon the plaintiff and other national banks doing business within the Commonwealth. The plaintiff asserts that national banks are agencies and instrumentalities of the Federal government and as such cannot constitutionally be taxed by a State except as permitted by congressional legislation. *Central Natl. Bank v. Lynn*, 259 Mass. 1, 7-8. *Commissioner of Corps. & Taxn. v. Woburn Natl. Bank*, 315 Mass. 505, 506-507, and cases cited. *Owensboro Natl. Bank v. Owensboro*, 173 U. S. 664, 668. *Des Moines Natl. Bank v. Fairweather, Mayor*, 263 U. S. 103, 106. *First Natl. Bank v. Hartford*, 273 U. S. 548, 550. *Iowa-Des Moines Natl. Bank v. Bennett*, 284 U. S. 239, 244.

Virtually all of these decisions and the doctrine which they espouse rely ultimately on Chief Justice Marshall's

¹⁶ Under certain circumstances, a vendor doing business in the Commonwealth who makes sales which are subject to the use tax is required to collect the tax and give the purchaser a receipt therefor. § 2, subsection 4. Such a receipt relieves the purchaser from further liability for the tax to which the receipt refers. § 2, subsection 3. The amounts reimbursed by the purchaser to such vendors need not be stated in a return filed by the purchaser. § 2, subsections 10 (a), 10 (b).

noted opinion in *M'Culloch v. Maryland*, 4 Wheat. 316. That case arose when Maryland imposed a tax upon notes issued by banks not chartered by the State Legislature in an attempt to drive the second national bank from Maryland. This tax directly interfered with a function crucial to the success of the bank, for the issuance of notes was a principal means of obtaining capital to be utilized for loans or other profit making activities. Moreover, the tax was levied upon an institution to which Congress had delegated important governmental functions.¹⁷ In holding the tax invalid, Chief Justice Marshall recognized the grave danger to the Federal government from a discriminatory State tax levied on an important fiscal agent of the United States. See 4 Wheat. 316, 431. The Chief Justice did, however, acknowledge that inherent power existed in the States to lay certain taxes on such an instrumentality. 4 Wheat. 316, 436. Unfortunately, this decision, as well as the later case of *Osborn v. The Bank of the United States*, 9 Wheat. 738, in which the court held unconstitutional a discriminatory Ohio tax levied upon the bank, established a doctrine of absolute intergovernmental immunity, regardless of the nature of the tax, which was to flower for the ensuing century. This doctrine was later referred to by Justice Frankfurter as a "web of unreality . . . [which] withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings

¹⁷ See Act of April 10, 1816, c. 44, 3 Stat. 266. For example, the United States owned twenty per cent of the capital stock of the second national bank. § 6. The President was empowered to appoint, subject to the approval of the Senate, five of the twenty-five directors of the bank. § 8. Notes issued by the bank were made legal tender for all Federal debts. § 14. The bank was made the depository of public funds of the United States. § 16. Upon the request of the Secretary of the Treasury, the bank was required to transfer public funds from place to place without charge. § 15.

of our federalism." *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 490.

The case of *Owensboro Natl. Bank v. Owensboro*, 173 U. S. 664, is to be read with this prior history in mind. There, in 1899, the Supreme Court held invalid a nondiscriminatory franchise tax of the State of Kentucky levied against a national bank created by the National Bank Act of 1863. The court, purporting to rely on its earlier decisions in the *M'Culloch* and *Osborn* cases, as well as in *Davis v. Elmira Sav. Bank*, 161 U. S. 275, held that a State is wholly without power to levy any tax upon national banks save that permitted by congressional act. No attempt was made to distinguish between the discriminatory taxes held invalid in the *M'Culloch* and *Osborn* cases and the tax levied by the State of Kentucky.

We do not believe we should be led by a blind reliance on stare decisis. The plaintiff cites no case in this century where the Supreme Court of the United States has struck down on constitutional grounds a nondiscriminatory State tax on a privately owned enterprise which is alleged to be an instrumentality of the United States. On the other hand, the Supreme Court has in recent years curtailed sharply the application of the doctrine of implied intergovernmental immunity to instrumentalities of the Federal government. See *United States v. Allegheny County*, 322 U. S. 174, 176-177; Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 632; and Powell, The Remnant of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 757.

In addition, a metamorphosis has taken place in the nature and functions of national banks. There is little resemblance between the operation of today's national bank and that of the second national bank or of national banks at the time the *Owensboro* case was decided by the Supreme

Court. It is thus our belief that the plaintiff's claim to immunity is to be judged according to contemporary conditions under principles enunciated in the more recent Supreme Court decisions relating to implied constitutional immunity of purported instrumentalities of the United States.

There has never been any doubt that a State cannot lay a tax upon the United States itself. *M'Culloch v. Maryland*, 4 Wheat. 316. *Mayo v. United States*, 319 U. S. 441. *United States v. County of Allegheny*, 322 U. S. 174. *Kern-Limerick, Inc. v. Scurlock, Commr. of Rev. for Arkansas*, 347 U. S. 110. Unfortunately there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax immune instrumentality of the United States. *Department of Employment v. United States*, 385 U. S. 355, 358-359.¹⁸ The appli-

¹⁸ See *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 522-524: "Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other. . . .

"When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. . . .

"As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. . . .

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the

cation of the principle of implied immunity "has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both Nation and State under our dual system." *James, State Tax Commr. v. Dravo Contr. Co.* 302 U. S. 134, 150. Such a claim must be narrowly construed. "[T]he implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax. . . ." *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 483.

The plaintiff's claim to implied constitutional immunity rests on the authority of decisions, cited previously, which characterized national banks as agencies and instrumentalities of the United States in construing their status under the National Bank Act.¹⁹ That Act was entitled: "An Act to provide National Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof." It authorized the formation of national banks to be employed as depositories and financial agents of the Federal government, but especially to be employed in facilitating the collection of internal duties and the transfer and disbursement of public moneys, and in

other; must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax. . . or the appropriate exercise of the functions of the government affected by it."

¹⁹ The Act was originally passed in 1863, Act of February 25, 1863, c. 58, 12 Stat. 665, but was amended considerably in 1864, Act of June 3, 1864, c. 106, 13 Stat. 99.

furnishing a safe and uniform note circulation. See *Van Allen v. The Assessors*, 3 Wall. 573, 582, 589-590. The functions conferred upon the national banks were not unlike those granted to their earlier predecessors, the United States Bank and the second United States bank. During the next half century the national banks played an important role in the establishment and supervision of national monetary policy. In addition, the banks performed some minor services beyond their enumerated powers pursuant to an authorization to exercise "all such incidental powers as shall be necessary to carry on the business of banking." Act of June 3, 1864, c. 106, § 8, 13 Stat. 101.

The Federal Reserve Act of 1913²⁰ reduced considerably the importance of national banks as fiscal agents of the United States. Welch, State and Local Taxation of Banks in the United States, New York Tax Commission: Special Report No. 7, p. 209. That Act, passed "To Provide for the establishment of Federal Reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes," placed upon the Federal Reserve System the responsibility of establishing and maintaining a national fiscal and monetary system. In effect, the Federal Reserve System assumed in large part the functions and responsibilities conferred in earlier years on the first two banks of the United States and successor national banks.

The Federal Reserve System also assumed responsibility relative to the entire banking industry. No longer are national banks the exclusive depository of government funds but Federal reserve banks and all member banks, regardless of whether they are State or national banks, are authorized to be Federal depositories. § 15, 38 Stat. 265, as

²⁰ Act of December 23, 1913, c. 6, 38 Stat. 251.

amended, 12 U. S. C. § 391 (1964). Although national banks are required to be members of the Federal Reserve System, State chartered banks may also become members. § 9, 38 Stat. 259, as amended, 12 U. S. C. § 321 (1964). Ninety-five per cent of all banks are insured by the Federal Deposit Insurance Corporation. *United States v. Philadelphia Natl. Bank*, 374 U. S. 321, 327. See § 5, 64 Stat. 876, as amended, 12 U. S. C. § 1815 (1964). This in itself subjects these banks to extensive supervision and control. "State member and nonmember insured banks are subject to a federal regulatory scheme almost as elaborate as that which governs the national banks." *United States v. Philadelphia Natl. Bank*, 374 U. S. 321, 327. Professor Davis has called Federal supervision of banking "[p]robably the outstanding example in the federal government of regulation of an entire industry through methods of supervision."¹

¹ Davis, *Administrative Law Treatise*, § 4.04, at p. 247.

In exchange, it seems, for the transfer of governmental functions from the national banks to the Federal Reserve System, Congress broadened the powers of national banks to engage in general banking. Welch, *supra*, at pp. 33-35. Almost thirty years ago the Supreme Court remarked that "[t]hough the national banks' usefulness as an agency to provide for currency has diminished markedly, their importance as general bankers shows a constant growth." *Colorado Natl. Bank v. Bedford*, 310 U. S. 41, 48. This growth dates from the passage of the Federal Reserve Act of 1913. Although the National Bank Act had prohibited national banks from making mortgage loans, Act of June 3, 1864, c. 106, § 28, 13 Stat. 108, the authority to make such loans was allowed in 1913 and expanded thereafter. § 24, 38 Stat. 273, as amended, 12 U. S. C. 371 (1964). See *Michigan Natl. Bank v. Michigan*, 365 U. S. 467, 471-472. The reduction of reserve requirements for "time" or "savings"

deposits, see, e.g., § 19, 38 Stat. 270, as amended, 12 U. S. C. § 462 (1964), placed national banks in a better position to compete with State banks for savings accounts. The Federal Reserve Act also provided for the granting of fiduciary powers to national banks. § 11 (k), 38 Stat. 262, as amended. 12 U. S. C. § 92a (a) 1964. The McFadden Act of 1927 expressly allowed national banks to buy and sell securities other than Federal and State obligations. Act of February 25, 1927, c. 191, § 2, 44 Stat. 1226, as amended, 12 U. S. C. § 24 (1964).

The sum total of the changes wrought during this century has been the assumption by the Federal Reserve System of the role of fiscal agent for the Federal government. The relegation of national banks to their present status as general commercial bankers makes any difference between them and their State chartered competitors hard to discern. The similarities between them are infinitely striking. Given a national bank and a State chartered trust company operating in the same community, one may know that both will have savings departments paying interest generally at an even rate. Both will engage in the business of commercial and real estate loans in competition. Both may have trust departments serving the same purpose. With the contemporary extension of the banking business into other allied fields both will compete in the area of similar sales and services. Both enjoy equal benefits from the protection of local and State government. Both are in business for the purpose of profit. In this highly mechanized day both will require expensive business machines either purchased in or without the State. Both will need real estate and attractive buildings in which to do business.

There are few dissimilarities. National banks are creatures of the Federal government in that they owe their very existence to congressional legislation. 12 U. S. C. § 21

(1964). They are required to be members of the Federal Reserve System. 12 U. S. C. § 222 (1964). The sole modern distinction of importance between the two lies in the fact that one is subject to Federal supervision, 12 U. S. C. §§ 21-215b (1964), while the other is supervised directly by the Massachusetts Commissioner of Banks under G. L. c. 167, §§ 1-11C.

We do not find these differences sufficient to exempt the plaintiff from the imposition of a nondiscriminatory tax of general application such as the use tax imposed by § 2 of the Act. That national banks were originally chartered by Congress is of historical interest but has little relevance in the determination of whether intergovernmental immunity should exist. *Railroad Co. v. Peniston*, 18 Wall. 5, 34. That they are required to join the Federal Reserve System makes them no more indispensable vehicles for effectuating national fiscal policy than the State chartered members of the system. In view of the increasingly massive Federal control over all aspects of the national economy, and particularly commercial banking, supervision by the Department of the Treasury of what is otherwise a privately owned institution engaged in the pursuit of profit does not bring the plaintiff to the close relationship with the government necessary to imply immunity under the Constitution.

A comparison with the two recent instances in which the Supreme Court of the United States has granted an entity other than the United States status as a tax immune instrumentality reveals the weakness of the plaintiff's claim to immunity. *Standard Oil Co. of Cal. v. Johnson, Treas. of Cal.* 316 U. S. 481, involved an attempt by California to impose a tax on the privilege of distributing motor vehicle fuel on United States Army post exchanges. The court concluded, after a detailed examination of the activities of United States Army post exchanges, all of which were gov-

ernmental in nature, that post exchanges "as now operated are arms of the Government deemed by it essential for the performance of governmental functions." 316 U. S. 481, 485. The holding of the court was not placed on constitutional grounds, the case being sent back for a further interpretation of the State statute in the light of the court's conclusion as to the status of post exchanges. Very recently the court held that the Red Cross is a Federal instrumentality for purposes of tax immunity. *Department of Employment v. United States*, 385 U. S. 355. It thus held invalid as applied to employees of the Red Cross a Colorado payroll tax designed to protect employment security.²¹ After reviewing its extensive and almost all pervasive relationship with the United States, Justice Fortas found that the Red Cross functioned "virtually as an arm of the Government."²²

²¹ In contrast to the status of employees of the Red Cross and other servants of the government which is peculiarly a matter of Federal concern, employees of national banks are expressly subjected to State unemployment laws. 26 U. S. C. § 3305 (c) (1964). See 26 U. S. C. § 3306 (c) (6) (1964).

²² 385 U. S. 355, 359-360. In explaining why the Red Cross is a tax exempt instrumentality of the United States, Justice Fortas further stated: "Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense, then War, Department. 33 Stat. 599, as amended, 36 U. S. C. § 1, et seq. Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors. 33 Stat. 601, as amended, 36 U. S. C. § 5. By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and

No contention can be made that the plaintiff functions as "an arm of the Government" as do the United States Army post exchanges or the Red Cross. Furthermore, there has been an unmistakable trend in recent Supreme Court decisions, many of which overrule earlier precedent, to deny implied constitutional immunity from State taxation to essentially private persons, both individual and corporate, who conduct businesses for profit and at the same time perform some governmental functions. In *James, State Tax Commr. v. Dravo Contr. Co.* 302 U. S. 134, the court sustained a West Virginia tax upon the income of a contractor derived from building locks and dams for the Federal government in that State. The cases of *Helvering, Commr. of Int. Rev. v. Gerhardt*, 304 U. S. 405, and *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, upset a century of precedents by permitting the application of the income taxes of each entity to employees of the other. The Supreme Court has held valid State sales and use taxes imposed upon contractors employed by the Federal government on a cost-plus-fixed fee basis even though the financial burden of the tax was passed on to the United States. *Alabama v. King & Boozer*, 314 U. S. 1 (sales tax). *Curry v. United States*, 314 U. S. 14 (use tax). See *United States v. Boyd, Commr.* 378 U. S. 39, 48-51. In *Oklahoma Tax Commn. v. Texas Co.* 336 U. S. 342, lessees of exempt Indian lands were held liable for State gross production and excise taxes on petroleum produced from such lands. More recently the court upheld a Michigan statute which imposed a real property tax on private parties using otherwise tax exempt property belonging to the Federal government. *United States v. Detroit*, 355 U. S. 466. *United States v.*

time again, both the President, and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government" (footnotes omitted) pp. 359-360.

Muskegon, 355 U. S. 484. *Detroit v. Murray Corp. of America*, 355 U. S. 489. The most striking of these Michigan cases is the one involving Muskegon. There the tax was sustained even though Continental Motors Corporation was using a government owned plant for the performance of government contracts without a lease or other cognizable property interest. "The vital thing," stated the majority, "is that Continental was using the property in connection with its own commercial activities. The case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a 'servant' of the United States in agency terms." 355 U. S. at p. 486.

The "Michigan cases" suggest that only a "servant" of the Federal government may gain Federal immunity. Van Cleve, States' Rights and Federal Solvency, 1959 Wis. L. Rev. 190, 206. At the least, they establish the proposition that privately owned corporations organized for profit which perform some governmental functions are not thereby immunized from nondiscriminatory State taxes of general application. Well before these cases, Professor Thomas Reed Powell, in criticizing the absolute immunity doctrine, called for recognition that some governmental activity may be business activity and should not thereby be automatically withdrawn from State taxation. Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633, 651 ff. The coexistence of private and governmental functions has come to be recognized in other fields. For example, national banks have been held to be private corporations for various purposes of Federal law. See *United States v. Philadelphia Natl. Bank*, 374 U. S. 321 (anti-trust laws); *United States v. First Natl. Bank & Trust Co.* 376 U. S. 665 (anti-trust laws). See also *National Labor Relations Bd. v. Bank of America Natl. Trust & Sav. Assn.*

130 F. 2d 624 (9th Cir.) (labor law). In an age of increased Federal involvement in all aspects of the national economy, recognition of the coexistence of private and governmental functions is necessary in order that the States may not be deprived of needed revenue. See generally Pierce, Tax Immunity Should Not Mean Tax Inequity, 1959 Wis. L. Rev. 173. This recognition would tend to prevent a benefit from running to an essentially private interest at the expense of the taxing government and without a corresponding benefit to the government in whose name the immunity is claimed. See *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 483.

Such an approach also fosters a sound tax policy of equality which dictates that all business for profit within a State share the cost of government services provided to all. The importance of preserving this tax equality between business competitors was recognized by the Supreme Court in the "Michigan cases." "As suggested before the legislature apparently was trying to equate the tax burden imposed on private enterprise using exempt property with that carried by similar businesses using taxed property.

In the absence of such equalization the lessees of tax-exempt property might well be given a distinct economic preference over their neighboring competitors, as well as escaping their fair share of local tax responsibility." *United States v. Detroit*, 355 U. S. 466, 473-474. The plaintiff national bank enjoys the benefits of State and local services, the protection of the laws of the State, access to its courts, and the patronage of its citizens. That the plaintiff should escape a tax borne by its State chartered competitors, many of which are members of the Federal Reserve System, is manifestly unjust. Were it to be held that the use tax was not applicable to national banks the competitive disadvantage to which they would put their State

chartered competitors is as obvious as it is inequitable. Moreover, equality helps to slow the rate of bank mergers and other efforts of State chartered banks to escape State supervision as well as obtain a commercial advantage. See *United States v. Philadelphia Natl. Bank*, 374 U. S. 321; *United States v. First Natl. Bank & Trust Co.* 376 U. S. 665.

We find nothing in the Constitution of the United States or the recent Supreme Court decisions interpreting it to prevent the application of the use tax to purchases made by the plaintiff and other national banks doing business in the Commonwealth. "There . . . [is] no discrimination against the Federal Government, its property or those with whom it does business. There . . . [is] no crippling obstruction of any of the Government's functions, no sinister effort to hamstring its power, not even the slightest interference with its property. Cf. *M'Culloch v. Maryland*, 4 Wheat. 316." *Detroit v. Murray Corp. of America*, 355 U. S. 489, 495. In fact, were we to construe subsection 5 (b) of § 2, or subsections 6 (d) and 6 (a) of § 1, to exempt this small group of privately owned institutions which have neither the need nor the right to such protection, could it not be said that serious constitutional problems under the Fourteenth Amendment of the Constitution of the United States would arise?

IV. EXEMPTION UNDER 12 U. S. C. § 548 (1964).

Finally, we confront the question whether the application of the use tax to purchases made by national banks violates any law of the United States. The plaintiff asserts that Rev. Sts. § 5219, as amended, 12 U. S. C. § 548 (1964), prohibits the imposition of such a tax upon a national bank. That provision, dealing with State taxation of national bank shares, provides in relevant part as follows: "The

legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with: 1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause." (Subdivision [c] places certain limits on taxes measured by net income and requires that the tax rate not be higher on national banks than other financial, mercantile, manufacturing, and business corporations doing business within the State.)

We recognize that § 548 has been interpreted to be the extent to which Congress has permitted State taxation of national banks. *Commissioner of Corps. & Taxn. v. Woburn Natl. Bank*, 315 Mass. 505, 506-507, and cases cited. *Owensboro Natl. Bank v. Owensboro*, 173 U. S. 664, 668-669. *Des Moines Natl. Bank v. Fairweather, Mayor*, 263 U. S. 103, 106. *First Natl. Bank v. Anderson, County Auditor*, 269 U. S. 341, 347. *First Natl. Bank v. Hartford*, 273 U. S. 548, 550-551. *Iowa-Des Moines Natl. Bank v. Bennett*, 284 U. S. 239, 244. *Colorado Natl. Bank v. Bedford*, 310 U. S. 41, 50-51. See *Michigan Natl. Bank v. Michigan*, 365 U. S. 467, 470; *Department of Employment v. United States*, 385 U. S. 355, 360. The soundness of this construction of § 548 has been questioned. Note, *Schweppes, State Taxation of National Bank Stocks: Uncertainty of its Constitutional Basis*, 6 Minn. L. Rev. 219. *Traynor, National Bank Taxation in California*, 17 Cal. L. Rev. 83, 84-94. The principle that § 548 stands as the outer limit of State power to

tax national banks, first advanced in *Owensboro Natl. Bank v. Owensboro*, 173 U. S. 664, necessarily depends on the underlying premise that absent such a statute the Constitution of the United States would prohibit a tax levied upon a national bank. Only if that preliminary conclusion is made can § 548, which only purports to regulate taxation of national bank shares, be interpreted to forbid the States from imposing other taxes on national banks. As already pointed out, we do not believe that this underlying premise, that the Constitution confers immunity on national banks, remains valid when judged in the light of recent decisions of the Supreme Court of the United States.

From the recent trend of Supreme Court decisions restricting severely the doctrine of implied constitutional immunity has emerged a countervailing principle. In these decisions the Supreme Court, while curtailing immunity as a matter of constitutional law, has indicated that Congress, if it desires, may confer immunity by statute. *United States v. Detroit*, 355 U. S. 466, 474, 475. Congress "has under the Constitution exclusive authority to determine whether and to what extent its instrumentalities . . . shall be immune from state taxation." *Maricopa County v. Valley Natl. Bank*, 318 U. S. 357, 361. *James, State Tax Commr. v. Dravo Contr. Co.* 302 U. S. 134, 160-161. *Pittman, Clerk of the Superior Court of Baltimore v. Home Owners' Loan Corp.* 308 U. S. 21, 32-33. *Oklahoma Tax Commn. v. United States*, 319 U. S. 598, 606-607. See, e.g., *Federal Land Bank v. Bismarck Lumber Co.* 314 U. S. 95; *Carson v. Roane-Anderson Co.* 342 U. S. 232; *Federal Land Bank v. Board of County Commrs. of Kiowa County, Kansas*, 368 U. S. 146.

Such immunity, however, must be expressly conferred. The Supreme Court of the United States has repeatedly said that tax exemptions are not granted by implication.

United States Trust Co. v. Helvering, Commr. of Int. Rev. 307 U. S. 57, 60. *Oklahoma Tax Commn. v. United States*, 319 U. S. 598, 606. This rule has been rigidly applied in the area of intergovernmental immunity. Congress has not created an immunity here by affirmative action, and “[t]he immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication. *Oklahoma Tax Commn. v. United States*, 319 U. S. 598, 604.” *Oklahoma Tax Commn. v. Texas Co.* 336 U. S. 342, 366. “Silence of Congress implies immunity no more than does the silence of the Constitution. . . . [I]f it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.” *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 480.

Any construction of § 548 which would prohibit the imposition of a use tax upon a national bank must rest on implication since the section, by its terms, does not purport to prohibit any taxation. Such an implied prohibition would be in marked contrast with numerous other statutory tax exemptions created by Congress.²³ The thrust of the recent decisions of the Supreme Court on intergovernmental tax immunity indicates that a statute like § 548 is not to be interpreted in a manner inconsistent with its express terms. For these reasons the application of the use tax to purchases made by the plaintiff does not violate any law of the United States.

²³ See, e.g., 12 U. S. C. § 531 (1964) (Federal reserve banks); 12 U. S. C. § 931 (1964) (Federal land banks); 12 U. S. C. § 931 (1964) (Federal land bank associations); 12 U. S. C. § 1433 (1964) (Federal home loan banks); 12 U. S. C. § 1464 (h) (1964) (Federal savings and loan associations); 12 U. S. C. § 1723 (e) (1964) (Federal National Mortgage Association); 12 U. S. C. § 1768 (1964) (Federal credit unions); 12 U. S. C. § 1825 (1964) (Federal Deposit Insurance Corporation).

V. CONCLUSION.

We are of the opinion that the plaintiff is not exempted from the taxes imposed by §§ 1 and 2 of the Act by virtue of subsections 6 (a) or 6 (d) of § 1, or of subsection 5 (b) of § 2. An interlocutory decree is to be entered overruling the demurrer. A final decree is to be entered declaring that emergency regulation No. 6 is valid in so far as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts sales and use taxes.

So ordered.

CUTTER, J. (concurring) The later part of the opinion of the court takes the position, with which I agree, that the Constitution of the United States and 12 U. S. C. § 548 (1964) do not prevent the imposition of a nondiscriminatory State use tax with respect to a situation or transaction in which a national bank has become the purchaser and user of tangible personal property. Similar considerations seem to me to permit the imposition of a nondiscriminatory State sales tax with respect to a transaction in which a national bank is the purchaser of tangible personal property. I concur in the result of the opinion of the court on this ground which seems to me to be implicit in what the opinion of the court says about the use tax. In my view, there is no occasion to decide whether the legal incidence of the Massachusetts sales tax is upon such a national bank as a retail purchaser or upon its vendor.

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, July 27, 1967.

IN THE CASE OF
FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY

v.

STATE TAX COMMISSION

Judgment—Rescript.

pending in the Supreme Judicial Court for the County of Suffolk

ORDERED, that the following entry be made in the docket; viz.—

Interlocutory decree to be entered overruling the demurrer.

Final decree to be entered in accordance with the opinion.

BY THE COURT,

RICHARD A. McLAUGHLIN,

July 27, 1967

Clerk

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK COUNTY, ss.

IN EQUITY
No. 69316

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY
v.

STATE TAX COMMISSION

Interlocutory Decree.

It is ordered, adjudged and decreed that the Defendants' Demurrer be overruled.

By the Court (Spiegel, J.)

JOHN E. POWERS

Entered August 9, 1967

Clerk

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT

No. 69316 EQUITY

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY
v.

STATE TAX COMMISSION

Final Decree.

This cause came on to further heard upon the rescript and opinion of the full bench and was argued by counsel; and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED AND DECREED:

1: Emergency regulation No. 6, of the State Tax Commission is valid in so far as it rules that purchases of tangible

personal property by national banks are subject to the Massachusetts sales and use taxes, St. 1966, c. 14, secs. 1 and 2.

, By the Court, (Spiegel, J.)

JOHN E. POWERS

Entered: August 9, 1967

Clerk.

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH.

EQUITY No. 6883

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY

v.

STATE TAX COMMISSION

**Notice of Appeal to the Supreme Court of the United States
by First Agricultural National Bank of Berkshire County.**

I. Notice is hereby given that the First Agricultural National Bank of Berkshire County hereby appeals to the Supreme Court of the United States from the final judgment (Rescript) of the Supreme Judicial Court for the Commonwealth of Massachusetts entered on July 27, 1967 ordering that an Interlocutory Decree and a Final Decree be entered and from the Final Decree after Rescript entered by the Supreme Judicial Court, Suffolk County, pursuant thereto entered on August 9, 1967. This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

By its attorney,

RONALD H. KESSEL

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK, ss.

IN EQUITY
No. 69316

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY

v.

STATE TAX COMMISSION

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By its attorney,

RONALD H. KESSEL

SUPREME COURT OF THE UNITED STATES.

No. 755. October Term 1967

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY,
Appellant,
v.

STATE TAX COMMISSION, *Appellee.*

Order Noting Probable Jurisdiction—January 15, 1967.

The motion of the Colorado Bankers Association for leave to file a brief, as *amicus curiae*, is granted. In this case probable jurisdiction is noted and the case is placed on the summary calendar.

OCT 23 1967

WINF. DAVIS, CLERK
Supreme Court of the United States.

OCTOBER TERM, 1967.

No. **755**

FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,
Appellant,

v.

STATE TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT.

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TABLE OF AUTHORITIES CITED

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Federal Reserve Act of 1913, 38 Stat. 251, c. 6	14
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Annual Report of the Comptroller of the Currency, 1965-1966, p. 21	22n.
12 C.F.R. parts 2-14; Comptroller's Manual for Na- tional Banks (1966)	14
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Supreme Court of the United States.

OCTOBER TERM, 1967.

No.

FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

JURISDICTIONAL STATEMENT.

This is an appeal from the judgment (Rescript) of the Supreme Judicial Court for the Commonwealth of Massachusetts entered July 27, 1967 and from a Final Decree after Rescript of the Supreme Judicial Court entered August 9, 1967, pursuant thereto. The appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

Opinion Below.

The opinion of the Supreme Judicial Court is reported at 1967 Mass. Adv. Sh. 1301. It is set forth at pages 25 to 53 in the Appendix to this Statement.

Jurisdiction.

The proceeding before a Single Justice of the Supreme Judicial Court which gives rise to this appeal was brought by a bill for declaratory relief pursuant to chapter 30A and chapter 231A of the General Laws of the Commonwealth of Massachusetts. The bill prayed *inter alia* that the court make a binding declaration that sales to the appellant, a national banking association, were exempt from both the Massachusetts Sales and Use Taxes (St. 1966, c. 14, § 1 and § 2) because the Commonwealth of Massachusetts is prohibited from taxing such sales and uses under the Constitution or laws of the United States. The bill also prayed for a binding declaration that Emergency Regulation No. 6 (issued by the appellee, the State Tax Commission), which ruled that the sale, lease or rental of tangible personal property to national banks is subject to the Massachusetts Sales and Use Taxes, is invalid for the same reason.

The Single Justice reserved and reported without decision the case to the full court of the Supreme Judicial Court. On July 27, 1967, the full court entered a judgment (Rescript) which concluded that the taxes imposed by St. 1966, c. 14, § 1 and § 2, as applied to the appellant, a national banking association, are not repugnant to the Constitution and laws of the United States, and decreed that Emergency Regulation No. 6 is valid insofar as it rules that purchases of tangible personal property by national

banks are subject to the Massachusetts Sales and Use Taxes. A Final Decree pursuant to the Rescript was entered on August 9, 1967. Notice of Appeal was filed on October 13, 1967.

This appeal is taken from the judgment of the Supreme Judicial Court and from the Final Decree entered pursuant thereto.¹

The statutory provision believed to confer on this Court jurisdiction of this appeal is 28 U.S.C. § 1257(2).

The cases believed to sustain the jurisdiction of this Court, in the order cited, are *Colorado Nat'l Bank of Denver v. Bedford*, 310 U.S. 41; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282; *Lake Erie & Western R.R. Co. v. State Public Utilities Commission of Illinois ex rel. Cameron*, 249 U.S. 422; *Atchison, Topeka & Santa Fe Ry. Co. v. Public Utilities Commission of California*, 346 U.S. 346; *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110; *United States v. County of Allegheny*, 322 U.S. 174; *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69; *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435.

Statutes Involved.

The Massachusetts statute involved is St. 1966, c. 14, § 1 and § 2, as amended by St. 1966, c. 483 (App. 53). Also involved is Emergency Regulation No. 6 (App. 71). The federal statute involved is 12 U.S.C. § 548 (App. 72).

¹ The Supreme Judicial Court is not a court of record, the record in this case being in the Superior Court. Although the judgment of the Supreme Judicial Court is final for purposes of appeal to this Court (*Cole v. Violette*, 319 U.S. 581), it is the Massachusetts practice to enter a further final decree upon the rescript of the Supreme Judicial Court, and, to avoid any question, this appeal is taken from both.

Questions Presented.

The ultimate question presented is whether the Massachusetts Sales and Use Tax statute, St. 1966, c. 14, § 1 and § 2 (and similarly Emergency Regulation No. 6), is invalid when applied to purchases by the appellant, a national banking association, because the application of these Massachusetts statutory provisions (and this Regulation) to such sales and uses is repugnant to the Constitution and laws of the United States.

This ultimate question involves, among others, the following subsidiary questions:

1. Does 12 U.S.C. § 548; prohibit the application of St. 1966, c. 14, § 1 (Sales Tax statute), and St. 1966, c. 14, § 2 (Use Tax statute), to purchases by a national banking association?
2. Does the Constitution of the United States prohibit the application of St. 1966, c. 14, § 1 (Sales Tax statute), and St. 1966, c. 14, § 2 (Use Tax statute), to purchases by a national banking association because such a national banking association is an instrumentality of the United States immune from all state taxation except such as has been specifically permitted by the Congress?
3. For the purpose of determining whether the application of St. 1966, c. 14, § 1 (Sales Tax statute), and of Emergency Regulation No. 6 to purchases by a national banking association is repugnant to the Constitution or laws of the United States, is the legal incidence of the sales tax imposed by St. 1966, c. 14, § 1, on a national banking association as a purchaser?

Statement of the Case.

1. **Material Facts.** The appellant, First Agricultural National Bank of Berkshire County, is a national banking

association organized under 12 U.S.C. § 21 *et seq.*, with its principal place of business in Pittsfield, County of Berkshire, Massachusetts. It is one of ninety national banking associations within the Commonwealth of Massachusetts. The appellee is the State Tax Commission of the Commonwealth of Massachusetts.

Since April 1, 1966, the appellant has paid Massachusetts Sales and Use Taxes on purchases for its own use of tangible personal property.

On March 28, 1966, the appellant, by its counsel, requested a ruling or emergency regulation that national banks are exempt from Massachusetts Sales and Use Taxes. No ruling was received by the appellant or its counsel pursuant to such request. On May 31, 1966, however, the State Tax Commission issued Emergency Regulation No. 6, which ruled that "The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax."

2. Proceedings Below and Federal Questions Presented.
A bill for declaratory relief under chapter 30A, § 7, and chapter 231A of the General Laws was filed on August 2, 1966, with the Justice of the Supreme Judicial Court sitting within and for the County of Suffolk. This bill was filed by the appellant against the State Tax Commission. In substance the bill sought a declaration that the recently enacted Massachusetts Sales and Use Taxes could not be applied to purchases made by a national banking association.

More particularly, the appellant prayed *inter alia* for a binding declaration under chapter 231A of the General Laws that sales to the appellant are exempt from the tax imposed by St. 1966, c. 14, § 1, because the Commonwealth of Massachusetts is prohibited from taxing such sales under the Constitution or laws of the United States. The bill also sought a binding declaration under chapter 231A

of the General Laws that the storage, use or other consumption of tangible personal property by the appellant is exempt from the tax imposed by St. 1966, c. 14, § 2, because the Commonwealth of Massachusetts is prohibited from taxing such storage, use or other consumption under the Constitution or laws of the United States. In addition, the bill sought judicial review of Emergency Regulation No. 6 issued by the State Tax Commission.

The appellee filed an answer which admitted all the allegations of fact pleaded in the appellant's bill. The bill and the answer raised the federal questions which are the subject matter of this appeal. The parties agreed to a statement of all the material facts constituting a case stated.

On August 24, 1966, by order of Paul C. Reardon, Justice of the Supreme Judicial Court, this case, at the request of counsel for both parties, was reserved and reported without decision to the full court of the Supreme Judicial Court for its determination and judgment or order, upon, among other things, the bill, the answer and the agreed statement of facts constituting a case stated.

The full court of the Supreme Judicial Court entered a Rescript on July 27, 1967, which, among other things, ordered that a Final Decree be entered in accordance with the court's opinion. The opinion passed on all the federal questions raised on this appeal (see pages 25 to 53 hereof). Thus it was stated in the opinion:

(1) "For these reasons [reasons given in the opinion] the application of the use tax to purchases made by the plaintiff [the appellant] does not violate any law of the United States"² (App. 52).

² Since the court concluded that the legal incidence of the Sales Tax is upon the vendor, the court confined its discussion of whether the Massachusetts statute was repugnant to the Constitution and laws of the United States to those portions of the statute which related to the Massachusetts Use Tax.

(2) "We find nothing in the Constitution of the United States or the recent Supreme Court decisions interpreting it to prevent the application of the use tax to purchases made by the plaintiff [the appellant] and other national banks doing business in the Commonwealth" ² (App. 48).

(3) "We conclude that the incidence of the sales tax is upon the vendor" (App. 35).

In accordance with the Rescript and the opinion of the full bench, a Final Decree was entered on August 9, 1967, which ordered, adjudged and decreed that "Emergency Regulation No. 6, of the State Tax Commission is valid in so far as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts sales and use taxes, St. 1966, c. 14, secs. 1 and 2" (App. 75).

The Questions are Substantial.

1. *The Questions are Properly Before the Court on Appeal.*

This is an appeal pursuant to 28 U.S.C. § 1257(2), where the validity of applying Massachusetts St. 1966, c. 14, § 1 (Sales Tax statute), and St. 1966, c. 14, § 2 (Use Tax statute), to purchases by national banking associations is drawn in question on the ground that each of these statutes is repugnant to the Constitution of the United States and 12 U.S.C. § 548.

The Supreme Judicial Court for the Commonwealth of Massachusetts, the highest state court in the Commonwealth, held that the application of the Massachusetts Use Tax to purchases by a national bank did not violate any law of the United States, expressly including 12 U.S.C. § 548. This Court, therefore, has jurisdiction under 28 U.S.C. § 1257(2). *Colorado National Bank v. Bedford*, 310 U.S. 41, 47. The Supreme Judicial Court also held that there

was nothing in the Constitution of the United States to prevent the application of the Use Tax to purchases by national banking associations. The court therefore upheld the validity of the Massachusetts Use Tax statute as applied to purchases by national banking associations as not being repugnant to the Constitution of the United States. For this reason the court also has jurisdiction under 28 U.S.C. § 1257(2).

It is, of course, clearly established that the "validity" of a state statute is also said to have been sustained within the meaning of 12 U.S.C. § 1257(2), when the state court holds the statute applicable to a particular set of facts (as is true in the instant case) and the contention is made that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282.

In addition, the Supreme Judicial Court ordered that "A final decree is to be entered declaring that emergency regulation No. 6 is valid insofar as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts sales and use taxes" (App. 52). The decision upholding the validity of this regulation also confers jurisdiction on this Court under § 1257(2). The reference in this section to "statute of any state" has been repeatedly defined to encompass orders of state commissions and governing bodies issued in the exercise of their delegated legislative authority. *Lake Erie & Western Railroad Co. v. State Public Utilities Commission of Illinois ex rel. Cameron*, 249 U.S. 422. *Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of California*, 346 U.S. 346, 348-349.

The question of whether the Massachusetts Sales Tax statute can be validly applied to purchases by a national banking association involves the further subsidiary question of whether the legal incidence of the sales tax is on

the seller or the purchaser.³ The Supreme Judicial Court held that the incidence of said tax was on the seller. This subsidiary question is also a federal question where federal rights are involved; and, as such, it is ripe for redetermination by this Court.

In *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110, this Court held, contrary to the decision of the Supreme Court of Arkansas, that the United States government, rather than certain private contractors, was the purchaser; and hence it was unconstitutional to apply the Arkansas Gross Receipt Tax Law to the transaction therein involved. The court was of the view that ". . . the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest" (p. 121). To the identical effect is *United States v. County of Allegheny*, 322 U.S. 174, 184.

Even in a situation where this Court is of the opinion that a state court's interpretation of a taxing statute is binding as a matter of state law, that construction is not determinative of whether the tax deprives the taxpayer of a federal right. "That issue turns not on the characterization which the state has given the tax, but on its operation and effect." *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 84. To the same effect is *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 443:

"A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction."

³ The court concluded that, "In contrast to the sales tax, there is no doubt that the incidence of the use tax is upon the purchaser" (App. 35).

Since the rights of the appellant under 12 U.S.C. § 548, and under the Constitution of the United States rest upon the characterization of the Massachusetts Sales Tax as a vendor or a vendee tax, the Supreme Judicial Court's characterization of that tax as a vendor tax is not binding on this Court for the purpose of determining whether the appellant's federal rights have been violated.

2. The Questions are Substantial and Important.

A. The Decision Below is in Direct Conflict with the Decisions of This Court.

Under 12 U.S.C. § 548, Congress has authorized state taxation of national banks only by one of four specified methods (in addition to taxes on their real estate). Neither the Massachusetts Sales Tax nor the Massachusetts Use Tax is one of the four methods of state taxation permitted by 12 U.S.C. § 548. The Massachusetts Sales and Use Taxes are not taxes levied on shares (or dividends therefrom) of a national bank; nor are they taxes on the net income (or according to the net income) of such a bank. Inasmuch as national banks, by reason of the provisions of 12 U.S.C. § 548, may not be taxed except as specifically provided thereunder, the Sales and Use Taxes enacted by the Commonwealth of Massachusetts are prohibited by 12 U.S.C. § 548, and are unconstitutional as applied to purchases by a national bank.

The decision below, however, held that a state can tax a national bank notwithstanding the absence of permissive legislation by Congress. This is in direct conflict with the decisions of this Court. National banks are instrumentalities of the Federal Government, created for a public purpose, and as such are necessarily subject to the paramount authority of the United States. This Court has repeatedly and consistently held that the respective states are wholly without power to levy any tax, either direct or

indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress. *Owensboro National Bank v. Owensboro*, 173 U.S. 664, 668. *First National Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 347. *First National Bank of Hartford, Wisconsin, v. Hartford*, 273 U.S. 548, 550. *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239. *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41.

In *Michigan National Bank v. Michigan*, 365 U.S. 467, 472, the majority opinion noted that this Court had passed on 12 U.S.C. § 548, and its predecessors, over fifty-five times in the near century of the section's existence. Both the opinion of this Court and the dissent by Whittaker, J., joined by Douglas, J., confirm that the sole authorization under which a state is permitted to tax a national bank is 12 U.S.C. § 548.

It is inconceivable that there could be any doubt concerning this matter. As recently as December 12, 1966, this Court said, in a unanimous decision, that the tax-immunity of national banks as instrumentalities of the United States "is beyond dispute." *Department of Employment v. United States*, 385 U.S. 355. This Court held that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation on its operations, and that this immunity had not been waived by congressional enactment. In so holding, this Court noted in an opinion by Justice Fortas, at page 360:

"In those respects in which the Red Cross differs from the usual government agency—*e.g.*, in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—*e.g.*, *national banks*—whose status as tax-immune instrumentalities of the United States is beyond dispute."

(Emphasis supplied.)

Despite a century of decisions by this Court which have clearly, unequivocally and unremittingly established (without even the slightest intimation otherwise) that states can directly or indirectly tax national banks only as Congress permits, the Supreme Judicial Court in the decision below has expressly and squarely held to the contrary.

B. *The Decision Below is in Direct Conflict with the Decisions of Other State Courts.*

Congress established a nationwide system of banks in the promotion of the legitimate ends of the Federal Government. At the same time it chose to permit a separate system of banks governed by state law. To protect the very basis of this dual banking system, however, Congress carefully defined the manner and the extent to which states are permitted to tax national banks. It is well established and (until the decision below) uncontroverted that the exclusive source of authority for the state taxation of these instrumentalities is in 12 U.S.C. § 548, and this has been so recognized by numerous state court decisions. *First National Bank of Birmingham v. State*, 262 Ala. 155, 77 S. 2d 653. *O'Neil v. Valley National Bank of Phoenix*, 58 Ariz. 539, 121 P. 2d 646. *First National Bank & Trust Co. v. West Haven*, 135 Conn. 191, 62 A. 2d 671. *People ex rel. Hanover Bank v. Goldfogle*, 234 N.Y. 345, 137 N.E. 611. *First National Bank of Portland v. Marion County*; 169 Ore. 595, 130 P. 2d 9. *Northwestern National Bank of Sioux Falls v. Gillis*,—S.D.—, 148 N.W. 2d 293. *Austin v. Seattle*, 176 Wash. 654, 30 P. 2d 646. For example, in the *West Haven* case it was held at page 192:

“National banks are agencies of the United States, created under its laws to promote its fiscal policies, and the banks, their property and their shares, cannot be taxed under state authority except as Congress con-

sents, and then only in conformity with restrictions attached to its consent."

There are no other state court decisions which hold or even suggest the contrary. Until the decision below, this was also the well-established rule in the Commonwealth of Massachusetts. Thus in *Commissioner of Corporations & Taxation v. Woburn National Bank*, 315 Mass. 505, 506, the Supreme Judicial Court could not have been any clearer when it said:

"Without Congressional permission a State has no right to impose a tax directly upon an instrumentality or agency of the United States such as a national bank."

Notwithstanding the overwhelming and undisputed decisions of the state courts, the opinion below, with a complete disregard for the foregoing authorities, has rejected what is a firmly settled and (until the decision below) unquestioned rule of law.

C. *The Decision Below has Interpreted 12 U.S.C. § 548, Contrary to the Intent of Congress and Decisional Law.*

While the opinion below recognized that 12 U.S.C. § 548, has been interpreted to set forth the outer bounds to which Congress has permitted state taxation of national banks (App. 49), the Court below nevertheless concluded that this section did not prohibit the application of the Massachusetts Use Tax to purchases by the appellant. The Supreme Judicial Court took the position that the principle that § 548 stands as the outer limit of state power to tax national banks necessarily depends on the underlying premise that, absent such a statute, the Constitution of the

United States would prohibit a tax levied on a national bank. "Only if that preliminary conclusion is made can § 548, which only purports to regulate taxation of national bank shares, be interpreted to forbid the States from imposing other taxes on national banks" (App. 50). These two premises (both of which are necessary in order to reach the conclusion of the court below)—i.e., that the Constitution of the United States does not prohibit the imposition of a nondiscriminatory state tax on a national bank and that 12 U.S.C. § 548, only purports to regulate the taxation of national bank shares and does not prohibit other methods of state taxation—are not correct.

As to the first of these two premises, the Supreme Judicial Court was of the view that national banks had lost their constitutional immunity from state taxation because a metamorphosis had taken place in the nature and functions of national banks. The decision below relied on the fact that the Federal Reserve Act of 1913 (Act of December 23, 1913, c. 6, 38 Stat. 251) reduced the role of national banks as fiscal agents of the United States and that the power of national banks to engage in general banking had been broadened.

But the decision below ignores the fact that national banks still retain their character as federal instrumentalities. National banks are creatures of the Federal Government and owe their very existence to congressional legislation. 12 U.S.C. § 21 *et seq.* They are subject to the continuing detailed supervision of the Treasury Department as the myriad of Treasury rules, regulations, required reports and examinations will attest. See, e.g., 12 U.S.C. §§ 21, 26, 30, 161, 481; 12 C.F.R. parts 2-14; Comptroller's Manual for National Banks (1966). As the *sine qua non* of the national banking system, national banks are the very foundation of a uniform federal banking structure which Congress established to promote the legitimate:

ends of the federal government now and in the future. They are the federal instrumentalities through which the national banking system conducts nationwide operations. As the only financial institutions which are *required* to be members of the Federal Reserve System (12 U.S.C. § 222), they are indispensable vehicles for executing national fiscal policy.

The decision below, moreover, shows a complete disregard for the decisions of this Court and the state courts. The following table of cases, arranged in chronological order (all of which confirm that the states are without power to tax national banks except pursuant to the express permissive legislation of Congress), were all decided after 1913, the year that the Federal Reserve Act was adopted, and hence after the alleged metamorphosis upon which the Supreme Judicial Court primarily relies:

- 1922 *People ex rel. Hanover Bank v. Goldfogle*, 234 N.Y. 345, 137 N.E. 611.
- 1926 *First National Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 347.
- 1927 *First National Bank v. Hartford, Wisconsin*, 273 U.S. 548, 550.
- 1931 *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239.
- 1934 *Austin v. Seattle*, 176 Wash. 654, 30 P. 2d 646.
- 1940 *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41.
- 1942 *First National Bank of Portland v. Marion County*, 169 Ore. 595, 130 P. 2d 9.
- 1942 *O'Neil v. Valley National Bank of Phoenix*, 58 Ariz. 539, 121 P. 2d 646.
- 1944 *Commissioner of Corporations & Taxation v. Woburn National Bank*, 315 Mass. 505, 506.
- 1948 *First National Bank & Trust Co. v. West Haven*, 135 Conn. 191, 62 A. 2d 671.

- 1954 *First National Bank of Birmingham v. State*, 262 Ala. 155, 77 S. 2d 653.
- 1961 *Michigan National Bank v. Michigan*, 365 U.S. 467, 472.
- 1966 *Department of Employment v. United States*, 385 U.S. 355.
- 1967 *Northwestern National Bank of Sioux Falls v. Gil-lis*,—S.D.—, 148 N.W. 2d 293.

The second premise of the court below (i.e., that 12 U.S.C. § 548, only purports to regulate the taxation of national bank shares and does not prohibit other methods of state taxation) is also incorrect. It is clear that Congress intended to limit the taxation of national banks to the four modes contained in § 548, notwithstanding the existence or nonexistence of a constitutional doctrine which would prohibit the taxation of national banks in the absence of congressional permission.

In *Bank of California v. Richardson*, 248 U.S. 476, this Court noted that the predecessor to § 548, which is in no way materially different from § 548 as presently in force for the purposes herein cited, was intended to control comprehensively the subject with which it dealt and thus to furnish the exclusive rule governing state taxation of national banks. This Court further noted that two provisions in apparent conflict were adopted by the Congress. First, the absolute exclusion of power in the states to tax national banks so as to prevent all interference with their operations, the integrity of their assets or the administrative governmental control over their affairs; second, preservation of the taxing power of the several states so that the financial resources engaged in the development of national banks might not be withdrawn from the reach of state taxation. The first aim was obtained by the non-

recognition of any power in the states to tax national banks except as to real estate. The second was reached by taxation of the stockholders of national banks.

"Full and express power on that subject [taxation of national bank stockholders] was given, accompanied with a limitation preventing its exercise in a discriminatory manner, a power which again from its very limitation was exclusive of other methods of taxation and left, therefore, no room for taxation of the federal agency or its instrumentalities or essential accessories, except as recognized by the provision in question." Pages 483-484.

That this is the proper construction of § 548 is thrown into even bolder relief by the anomalous nature of the result reached in the opinion of the Supreme Judicial Court below. Under the reasoning of that opinion, the several states are completely free to employ any method of taxation of national banks (except perhaps for discriminatory taxation) which they see fit. The only restrictions on the states, according to the Supreme Judicial Court, are those relating to the taxation of national bank shares. This result is most perplexing. The decision below (if allowed to stand) would produce the following startling results: First, although § 548 places fairly elaborate and complex restrictions on the taxation of national bank shares, no longer (according to the Supreme Judicial Court) would this congressional legislation restrict in any manner whatsoever other methods of state taxation; and second, § 548 as so construed would be squarely in conflict with the intent of Congress.

If anything is clear from the legislative history of the original predecessor (Act of June 3, 1864, c. 106, § 41, 13 Stat. 111) to § 548, it is that Congress intended to permit

the taxation of national banks by states only in a limited fashion. The congressional debates indicate that Congress was divided into two factions—those who opposed any state taxation of national banks whatsoever, and those who favored some limited form of state taxation. The debates further indicate that Congress did not even consider the possibility of a broad statutory provision which would give the several states general permission to tax national banks. See Cong. Globe, 38 Cong. 1st Sess. 1865-1866; 1871-1874; 1889-1900; 1989, 2128-2132, 2142 (1864). Yet the decision below, rather than giving effect to this congressional intent, has construed 12 U.S.C. § 548, so that the several states would no longer be restricted to the methods of taxation expressly permitted by 12 U.S.C. § 548.

D. The Decision Below Erred in Holding that the Massachusetts Sales Tax is a Tax on the Seller.⁴

Massachusetts St. 1966, c. 14, § 1, subsec. 2, imposes an excise upon sales at retail in Massachusetts of tangible personal property by any vendor at the rate of 3% of the gross receipts of the vendor from such sales. It is not a tax on the privilege of selling at retail, or a so-called "occupational tax." Rather, it is a tax imposed on the sale itself.

The full amount of the tax must be *added* to the sales price and *collected* from the purchaser.

"Subsection 3. Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the

⁴ As indicated on pages 8 to 10 hereof, this matter involves a federal question because federal rights (those of a national bank under the Constitution of the United States and 12 U.S.C. § 548) are affected.

sales price and shall collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.” (Emphasis supplied.)

To emphasize that the vendor is a conduit acting only as a collector of the tax, not only must the tax be added to the sales price and collected from the consumer, but also the amount of the tax must be stated and charged separately from the sales price. St. 1966, c. 14, § 1, subsec. 5. Conversely, “In determining the ‘sales price’ there shall be excluded . . . the amount of reimbursement of tax paid by the purchaser to the vendor . . .” St. 1966, c. 14, § 1, subsec. 1(14)(c)(iv). In addition, it is unlawful for a vendor to advertise that the tax will be absorbed or assumed by the vendor or that it will not be added to the selling price. St. 1966, c. 14, § 1, subsec. 23. The role of the vendor as merely a tax collector, rather than as the party taxed, is underscored by the fact that the vendor receives compensation for collecting the tax. St. 1966, c. 14, § 1, subsec. 14.

The true character of the Massachusetts Sales Tax as a tax on purchasers is thrown into even bolder relief by the numerous vendees who are exempt from the tax. Thus sales to the United States, the Commonwealth of Massachusetts, or any political subdivision thereof and their respective agencies are exempt. Also exempt are sales to religious, scientific, charitable and educational organizations. St. 1966, c. 14, § 1, subsec. 6(d) and (e).

The test developed and applied by this Court for determining whether a sales tax is a tax on the seller or on the buyer is whether the "legal incidence" of the tax falls on the vendor or the vendee. The foregoing analysis and contention of the appellant, that the "legal incidence" of the Massachusetts Sales Tax is on the purchaser, is clearly supported by the decisions of this Court.

The leading case on this point is *Alabama v. King & Boozer*, 314 U.S. 1, which held that under state law the legal incidence of a tax which is imposed on a vendor but which the vendor is required to add to the sales price and collect from the purchaser is on the purchaser. It so held despite the fact that under the relevant Alabama statute the seller was denominated the "taxpayer." This case has been followed in a number of decisions of this Court.

In *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, the Supreme Court held that the incidence of a North Dakota sales tax was on the purchaser, a Federal Land Bank, and hence sales to it were immunized from state taxation by congressional legislation. The sales tax provisions were strikingly similar to those of the Massachusetts Act. In holding that the legal incidence of the sales tax was on the purchaser, the court said at page 99:

"It is clear that the North Dakota statute makes the purchaser, petitioner here, liable for the sales tax. Section 6 of the Act requires the retailer to add the tax to the sales price and declares the tax to be a debt from the consumer to the retailer. Section 7 makes it unlawful for the retailer to hold out that he will absorb or refund the tax in whole or in part."

To the identical effect are *Carson v. Roane-Anderson Co.*, 342 U.S. 232, and *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110.

A converse situation was presented in *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41, 44. That case involved a 2% state tax on, *inter alia*, the value of safe-deposit services. The Colorado National Bank contended that as a federal instrumentality it was immune, under 12 U.S.C. § 548, from the payment of a tax on the rentals it received for such services. The court assumed the tax would be invalid if laid upon the bank, but held that the tax was upon the user of the safe-deposit boxes and not upon the bank. Hence, the tax was valid. It based this conclusion on the ground that the tax statute required ". . . as far as practicable, [to] add the tax imposed . . . to the value of services or charges showing such tax as a separate and distinct item . . ." For this reason the court was of the view that the incidence of the tax was on the user of the safe-deposit box.

The teaching of the decisions of this Court is clear. Where a sales tax is *required* to be added to the sales price and collected from a purchaser, the legal incidence of that tax is on the purchaser. This, of course, is precisely the nature of the Massachusetts Sales Tax. St. 1966, c. 14, § 1, subsec. 3, expressly provides that ". . . each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax . . ." (Emphasis supplied.) The tax, moreover, must be stated and charged separately from the sales price. In addition, vendors cannot advertise that they will absorb or assume it.

Despite the merits of the appellant's contention and the decisions of this and other courts, the Supreme Judicial Court chose to hold that the legal incidence of the Massachusetts Sales Tax is upon the vendor. Appellant submits that this was error and, inasmuch as federal rights are involved, this error can and should be corrected by this Court.

E. A Decision by This Court will have a Substantial Impact on Other National Banks.

The decision below, of course, directly affects approximately ninety national banks in Massachusetts. Hence a determination by this Court as to any of the questions presented on this appeal will similarly affect these same financial institutions. A decision by this Court, moreover, will have even broader consequences.

At present there is pending litigation directly relating to the application of sales and use taxes to national banks in Florida, Pennsylvania and New York.⁵ The New York litigation has produced a decision in *Liberty National Bank and Trust Co. v. Buscaglia*, 26 App. Div. 2d 97, 270 N.Y.S. 2d 871, which has held that national banks as purchasers are immune from the sales and use taxes there in question. The court was of the opinion that only Congress could confer power to impose such taxes on national banks. That case is presently on appeal to the New York Court of Appeals. There have not yet been any decisions in the Florida and Pennsylvania cases. A decision by this Court will clearly affect all the aforementioned pending litigation as well as substantially reduce, if not entirely eliminate, litigation which will undoubtedly be generated in other states by the decision below.

Any ruling by this Court with respect to the liability of national banks for sales and use taxes will affect all the 4,471 national banks⁶ located in the forty-three states which

⁵ *First National Bank of Homestead v. Dickinson*, N.D. Fla., Civil No. 1226, Dec. 23, 1966; *Commonwealth of Pennsylvania v. Northeastern National Bank & Trust Co.*, Ct. of Common Pleas, Dauphin County, Pa., Civil No. 126, April 6, 1967.; *Liberty National Bank & Trust Co. v. Buscaglia*, 26 App. Div. 2d 97, 270 N.Y.S. 2d 871, appeal docketed, No. 203, Ct. of App., April 25, 1967.

⁶ Annual Report of the Comptroller of the Currency, 1965-1966, p. 21.

presently impose general sales and use taxes.⁷ Mention should be made of the fact that of the aforementioned jurisdictions twenty-four of them expressly exempt national banks from such taxation by way of a statutory provision, regulation or other state ruling.⁸ These exemptions, which affect 2,523 national banks,⁹ are no doubt grounded on what until now has been an uncontested rule of law, i.e., that the states cannot tax national banks except as Congress permits. Thus a decision on that rule of law by this Court will in all likelihood affect every one of these state exemptions.

The opinion below, while dealing directly only with the Massachusetts Sales and Use Taxes, also affects matters extending well beyond the area of sales and use taxation. The Massachusetts decision directly attacks and (if allowed

⁷ General sales and use taxes are imposed by all states except Alaska, Delaware, Minnesota, Montana, New Hampshire, Oregon and Vermont. C.C.H. All-State Sales Tax Rep. ¶ 301.

⁸ National banks have such exemptions from sales and use taxes in the following states:

Alabama	Michigan
Arizona	Missouri
Arkansas	New York
Colorado	North Carolina
Connecticut	North Dakota
Georgia	Ohio
Hawaii	South Dakota
Illinois	Texas
Indiana	Utah
Louisiana	West Virginia
Maine	Wisconsin
Maryland	Wyoming

to stand) undermines the firmly established concept that a national bank is a federal instrumentality. The relationship of national banks to the Federal Government is an important factor affecting the status of national banks under a vast spectrum of state law. A decision by this Court with respect to the status of national banks as instrumentalities of the Federal Government, therefore, would have a far-reaching effect on the extent to which states can tax, regulate and otherwise impose their authority on such banks. For this reason, such a decision would affect approximately 4,800 national banks conducting banking operations in all of the several states.¹⁰

Conclusion.

For the aforementioned reasons the appellant submits that the decision of the Supreme Judicial Court is plainly wrong, and that the questions presented by this appeal are properly before this Court, are substantial, and are of public importance.

Respectfully submitted,

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¹⁰ See footnote 6.

Appendix.

Massachusetts Advance Sheets (1967), Pages 1301-1325.

**FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE
COUNTY vs. STATE TAX COMMISSION.**

Suffolk. March 7, 1967—July 27, 1967.

Present: WILKINS, C.J., WHITTEMORE, CUTTER, SPIEGEL, & REARDON, JJ.

Taxation, Sales tax, Use tax, Exemption, Agency of the United States, Intergovernmental immunity, National bank. Constitutional Law, National bank, Taxation. National Bank: Equity Jurisdiction, Declaratory relief. State Administrative Procedure Act. Words, "Agency."

Reservation and report by Reardon, J., of a suit in equity in the Supreme Judicial Court for the county of Suffolk.

REARDON, J. This is a bill for declaratory relief under G. L. c. 231A and c. 30A, § 7, which came first before a single justice. The plaintiff, a national bank, seeks a binding declaration that it is exempt from the recently enacted Massachusetts sales and use tax, St. 1966, c. 14, §§ 1 and 2 (Act). Judicial review is also sought of emergency regulation No. 6 issued by the defendant State Tax Commission (Commission). The Commission demurred to the bill and, without waiving its demurrer, filed an answer. The parties have filed a statement of agreed facts constituting a case stated. The matter was reserved and reported without decision by the single justice.

The plaintiff is a national banking association organized under 12 U. S. C. § 21, et seq. (1964), with its principal place of business in Pittsfield. It is one of ninety national banking associations within Massachusetts. Since April 1, 1966, the plaintiff has paid sales and use taxes to its vendors on purchases of tangible personal property within the Commonwealth. The amount of these taxes totaled \$575.66 during the period from April 1, 1966, to June 30, 1966. On

March 28, 1966, the plaintiff requested from the Commission a ruling or emergency regulation that national banks are exempt from Massachusetts sales and use taxes. No ruling was received by the plaintiff pursuant to its request. The Commission on May 31, 1966, issued emergency regulation No. 6, which ruled that "[t]he sale, lease, or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax."¹ This regulation remains in full force and effect. No other regulation pertaining to the sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations has been issued. The plaintiff will be unable to carry on its banking operations unless it continues to make purchases which by the provisions of emergency regulation No. 6 are deemed to be subject to the Massachusetts sales and use tax. Massachusetts vendors have refused to make retail sales of tangible personal property to the plaintiff unless it agrees to reimburse such vendors for the Massachusetts sales tax thereon.

I. THE COMMISSION'S DEMURRER.

We first deal with the Commission's demurrer which is based on the ground that the Act provides an exclusive remedy by which the question of sales tax liability may be raised. While § 1, subsection 22, provides that the tax abatement remedy encompassed by subsections 20-22 shall

¹ Emergency regulation No. 6 also states, "National banks and Federal savings and loan associations making sales of tangible personal property must collect the sales tax to the same extent as other vendors making such sales." We do not consider this portion of the regulation even though the plaintiff alludes to it several times in its brief. Neither the allegations of the bill nor the facts constituting a case stated raise the question of the applicability of the Act to sales made by national banks to its customers.

be "exclusive,"² it contains no reference as to the proper mode of review of regulations issued by the Commission. Lacking an exclusive mode of review, judicial review of any regulation by a suit for declaratory relief is authorized by G. L. c. 30A, § 7. See *Westland Housing Corp. v. Commissioner of Ins.* Mass. The Commission apparently issued emergency regulation No. 6 pursuant to its regulation making authority. G. L. c. 14, § 4. Emergency regulation No. 6 also constitutes a "regulation" within the meaning of G. L. c. 30A, § 1 (5). See Curran & Sacks, The Massachusetts Administrative Procedure Act, 37 B. U. L. Rev. 70, 77-78. Our jurisdiction extends, at the least, to a review of the validity of emergency regulation No. 6. Curran & Sacks, *supra*, at 84. That regulation places in controversy the plaintiff's claim that it is exempt from the taxes imposed by the Act under subsections 6 (a) and 6 (d) of § 1, subsection 5 (b) of § 2, and under the Constitution and laws of the United States. The Commission's demurrer should be overruled.

The issue thus presented for our determination is whether the sales and use tax imposed by the Act can be applied to purchases made by the plaintiff and other national banks doing business in the Commonwealth.

II. STATUTORY EXEMPTION.

Sales and use taxes.

Section 1, subsection 6 (d), exempts "[s]ales to the United States, the commonwealth of Massachusetts or any political subdivision thereof, or their respective agencies."³

² Mass. Adv. Sh. (1967) 655, 661.

³ See also § 2, subsection 11.

³ Section 2, subsection 5 (b), provides that the use tax provisions shall not apply to sales exempt from the taxes imposed under § 1 of the Act.

The plaintiff purports to be an "agency" of the United States and, therefore, exempt from the sales and use taxes. A statute granting an exemption must be strictly construed. "The burden of proof is upon the one claiming the exemption to show clearly and unequivocally that he comes within the terms of the exemption." *Milton v. Ladd*, 348 Mass. 762, 765, and cases cited. Consideration may be given to the interpretation of the Act expressed by emergency regulation No. 6 and other administrative regulations contemporaneous with the enactment of the law. See *Cleary v. Cardullo's Inc.* 347 Mass. 337, 343, and cases cited.

Without question, as contended by the plaintiff, national banks are subject to certain supervision by the Federal government. The same may be said of railroads, airlines, commercial carriers of mail, radio stations, and many other private concerns which enter into relationships with the government of the United States and perform governmental services. That they do so does not in and of itself make them "agencies" of the United States. A national bank is essentially a privately owned corporation, privately managed and operated in the interest of its stockholders. Whatever role a national bank has in furthering the fiscal policies of the Federal government is incidental to its primary purpose of returning profit to its stockholders. See *National Labor Relations Bd. v. Bank of America Natl. Trust & Sav. Assn.* 130 F. 2d 624, 627 (9th Cir.); "Instrumentalities like the national bank . . . , in which there are private interests, are not departments of the Government. They are private corporations in which the Government has an interest." *Emergency Fleet Corp., United States Shipping Bd. v. Western Union Tel. Co.* 275 U.S. 415, 425-426.⁴

⁴ "The government need not perform all its functions by the use of its property and the activity of its officers, but may establish agencies to these ends. Such an agency, created not for private gain but wholly devoted to governmental purposes and wholly

Their status as private corporations will be more thoroughly explored below.⁵

In our view the Legislature intended "agency" to mean either a regularly constituted department of government or an entity which is wholly owned by the government and which exercises exclusively governmental functions. At best, the plaintiff is a creature of the United States and not entitled to an exemption as an "agency" of the United States. We therefore hold that purchases made by the plaintiff national bank are not exempt by virtue of either subsection 6 (d) of § 1 or subsection 5 (b) of § 2 of the Act as sales to an "agency" of the United States.

III. CONSTITUTIONAL EXEMPTIONS.

A. Sales tax.

Since the plaintiff is not exempted under the terms of subsection 6 (d) of § 1 of the Act, can there be exemption in its favor under subsection 6 (a)? That provision exempts from the imposition of the sales tax "[s]ales which the commonwealth is prohibited from taxing under the constitution and laws of the United States."

owned by the United States, is as free from state taxation on its property and its activities as the government itself. . . . In the exertion of the powers conferred upon it by the Constitution, the United States may, in its discretion, erect corporations for private gain and employ them as its instrumentalities." *James, State Tax Commr. v. Dravo Contr. Co.* 302 U. S. 134, 163 (Roberts, J. dissenting).

⁵ We reserve also for later discussion various judicial utterances that have characterized national banks as "agencies" or instrumentalities of the Federal government. See, e.g., *Owensboro Natl. Bank v. Owensboro*, 173 U. S. 664, 667-668; *First Natl. Bank v. Hartford*, 273 U. S. 548, 550; *Providence Inst. for Sav. v. Boston*, 101 Mass. 575, 584; *Central Natl. Bank v. Lynn*, 259 Mass. 1, 7-8; *Commissioner of Corps. & Taxn. v. Woburn Natl. Bank*, 315 Mass. 505, 506; *Squantum Gardens, Inc. v. Assessors of Quincy*, 335 Mass. 440, 444.

The Commission contends that the sales tax is not imposed upon the purchaser, as alleged by the plaintiff, but rather is a tax upon the vendors who sell tangible personal property to the plaintiff. If the tax does fall on the vendor, that the economic burden of the tax may be passed on by the vendor to the plaintiff offends neither the sovereign immunity of the United States nor the laws of the United States relative to State taxation of national banks. *Western Lithograph Co. v. State Bd. of Equalization*, 11 Cal. 2d 156. *National Bank of Hyde Park v. Isaacs, Director of Rev.* 27 Ill. 2d 205. *Federal Reserve Bank v. Department of Rev.* 339 Mich. 587. *National Bank v. Department of Rev.* 340 Mich. 573, app. dism. 349 U. S. 934. See *Alabama v. King & Boozer*, 314 U. S. 1, 8-9. Any exemption the plaintiff may claim under subsection 6 (a) will be controlled by whether the purchaser or the vendor bears the legal incidence of the Massachusetts sales and use taxes. *Alabama v. King & Boozer*, 314 U. S. 1. *Curry, Commr. of Rev. of Alabama, v. United States*, 314 U. S. 14. *Kern-Limerick, Inc. v. Scurlock, Commr. of Rev. for Arkansas*, 347 U. S. 110, 121-122.

The legal incidence of a tax has been held by the Supreme Court of the United States to be determined by "who is responsible . . . for payment to the state of the exaction." *Kern-Limerick, Inc. v. Scurlock, Commr. of Rev. for Arkansas*, 347 U. S. 110, 121-122. This determination is not always easy because of the similarities existing generally in the structure of State sales taxes regardless of whether the legal incidence of the tax is imposed upon the vendor⁶ or

⁶ In States in which the legal incidence of the tax is imposed upon the vendor, the legal basis of the tax is "for the privilege of engaging in such business" (see, e.g., Mich. Compiled Laws, 1948, § 205.52), or is a "Retailers' Occupation Tax" (see, e.g., Ill. Rev. Sts., 1965, c. 120, § 440).

upon the purchaser.⁷ The economic burden of the tax is almost universally passed along to the purchaser although practical considerations necessitate its collection and remission to the State by the vendor. Notwithstanding these ambiguous aspects inhering generally in sales taxes, we confront the question of which party the General Court intended should bear the legal incidence or ultimate burden of the tax.

Our Act is neither a vendor tax nor a purchaser tax but a hybrid tax containing elements of both vendor and purchaser taxes. See Dane, *The New Sales and Use Tax Law*, 51 Mass. L. Q. 239, 246-249. The tax is in part a levy on the vendor for the privilege of selling at retail.⁸ The liability for the sales tax is based on three per cent of a vendor's "gross receipts" from all retail sales of tangible personal property rather than the amount of taxes actually collected from purchasers.⁹ St. 1966, c. 14, § 1, subsection 2. Worthy of specific note is the liability of the vendor

⁷ See Ohio Rev. Code & Serv., c. 5739.03. See also 36 Maine Rev. Sts. Anno., § 1753: "The liability for, or the incidence of, the tax on tangible personal property provided by . . . [the sales and use tax] is declared to be a levy on the consumer."

⁸ Statute 1966, c. 14, § 1, subsection 7 (a), provides that "[n]o person shall do business in this commonwealth as a vendor unless a registration . . . shall have been issued to him." A vendor's failure to comply with the requirements of the statute may result in the revocation of his registration. § 1, subsection 7 (c).

⁹ Most States have held this to be true even though disparities occur due to a bracket collection system similar to that contained in § 1, subsection 4. *De Aryan v. Akers*, 12 Cal. 2d 781. *Stevens Enterprise, Inc. v. The State Commn. of Rev. & Taxn. of the State of Kansas*, 179 Kans. 696. *W. S. Libbey Co. v. Johnson, State Tax Assessor*, 148 Maine, 410. *Piedmont Canteen Serv. Inc. v. Johnson, Commr. of Rev.* 256 N. C. 155. *F. W. Woolworth Co. v. Gray*, 77 N. D. 757. *Smoky Mountain Canteen Co. v. Kizer, Commr. of Fin. & Taxn.* 247 S. W. 2d 69 (Tenn.). *White v. Washington*, 49 Wash. 2d 718.

to make return of the tax to the Commonwealth for gross sales made by him of items where individual sales do not exceed eighteen cents.¹⁰ § 1, subsections 2 and 4. On such items the purchaser does not reimburse the vendor for any tax whatsoever. The responsibility for payment to the Commonwealth is exclusively upon the vendor.¹¹ He is the "taxpayer" or person required to make returns and to pay the tax to the Commonwealth. See St. 1966, c. 14, § 1, subsections 9 and 10. See also § 1, subsection 17. The assessment and collection of unpaid taxes through both criminal and civil remedies may be made only against the vendor. § 1, subsections 15-19. Likewise, the tax abatement procedures provided by § 1, subsections 20-22, are applicable only to vendors.¹² Chapter 14, § 1, makes no provision permitting the Commonwealth to enforce the payment of the sales tax against a purchaser. Cf. N. Y. Consol. Laws, c. 59, § 1133; Ohio Rev. Code & Serv. § 5739.13.

The liability initially laid upon the vendor to remit the tax to the Commonwealth does not of necessity require the conclusion that the legal incidence of the tax is imposed upon him. A sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. See *Federal Land Bank v. Bismarck Lumber Co.* 314 U. S. 95, 99. See also *Alabama v. King & Boozer*, 314 U. S. 1, 9-10. The plaintiff argues that by

¹⁰ But see § 1, subsection 6 (t), exempting under certain conditions sales of tangible personal property through coin operated vending machines, the cost of which does not exceed ten cents.

¹¹ But see, as an exception, St. 1966, c. 483, amending St. 1966, c. 14, § 1, subsection 3, which provides that the sales tax on motor vehicles and trailers be paid by the purchaser to the registrar of motor vehicles rather than to the vendor.

¹² For purposes of the use tax imposed by § 2, the assessment, collection, and abatement provisions of § 1 are applicable to purchasers. § 2, subsection 11.

virtue of § 1, subsections 3 and 23 of the Act, it bears the legal incidence of the tax. Subsection 3 provides that "each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section."¹³ Subsection 23 prohibits as unlawful advertising the holding out by any vendor that he will assume or absorb the tax on any sale that he may make. However, neither subsection 3 nor 23, singly or together, imposes any sanction on a vendor who chooses not to charge the tax. His liability to the State remains at three per cent of his gross receipts whether or not he chooses to collect the tax from his purchasers.¹⁴ The Commonwealth can proceed only against him for the collection of unpaid taxes. We are of the opinion that subsections 3 and 23 fall short of shifting the legal liability, or incidence, of the tax placed initially on the vendor to the purchaser.

There is no necessary inconsistency between imposing the legal incidence of a tax upon the vendor, yet recognizing a statutory right in the vendor to shift the tax to the purchaser. See Mich. Compiled Laws, 1948, § 205.73, as amended by PA 1949, No. 272 (Stat. Anno. 1950 Rev. § 7.544), construed in *National Bank v. Department of Rev.*

¹³ Section 1, subsection 4, contains a bracket system to facilitate collection of the tax from the purchaser. The statute also requires that the amount of the tax "shall be stated and charged separately from the sales price." § 1, subsection 5. See also § 1, subsection 1 (14) (c) (iv).

¹⁴ We believe that these subsections are aimed more at the cultivation of a happy relationship between the vendors and customers than at any mandate that the taxes be collected from the purchaser. The vendor at his option may add the tax to his selling price without being accused of a price increase. At the same time, the small vendor is not put at a competitive disadvantage with larger retailers who conceivably could increase their business volume by advertising a willingness to absorb the tax. See Dane, *The New Sales and Use Tax Law*, 51 Mass. L. Q. 239, 248.

334 Mich. 132, 137. See also *Federal Reserve Bank v. Department of Rev.* 339 Mich. 587; *National Bank v. Department of Rev.* 340 Mich. 573, app. dism. 349 U. S. 934. The thrust of these cases is that the Michigan sales tax is upon the vendor notwithstanding the intent of the Legislature that the economic burden of the tax was to be passed on to the consumer and that such a requirement was imposed by administrative regulation. *National Bank v. Department of Rev.* 334 Mich. 132, 137.

We think our Act is clearly distinguishable from the North Dakota sales tax, urged by the plaintiff as "strikingly similar," reviewed by the Supreme Court of the United States in *Federal Land Bank v. Bismarck Lumber Co.* 314 U. S. 95.¹⁵ That statute punished a vendor's failure to collect the tax as a misdemeanor. See N. D. Century Code (Anno.) § 57-39-16 (5). The plaintiff's reliance on *Alabama v. King & Boozer*, 314 U. S. 1, 7, is misplaced for the same reason. The Alabama sales tax statute reviewed in that decision made a vendor criminally liable if he failed or refused to collect the tax from the purchaser. Alabama Code, 1940, Tit. 51, § 776. Other decisions cited by the plaintiff, see, e.g., *Avco Mfg. Corp. v. Connelly*, 145 Conn. 161, that have relied on cases such as *Federal Land Bank v. Bismarck Lumber Co.* and *Alabama v. King & Boozer* to impose the legal incidence of the tax upon the purchaser, are equally unhelpful. Nor do we agree with *Liberty Natl. Bank & Trust Co. v. Buscaglia*, 26 App. Div. 2d (N. Y.) 97. That decision is in conflict with a later case, *Pierce v. State Tax Commn.* 52 Misc. 2d

¹⁵ There, at p. 99, the court stated: "It is clear that the North Dakota statute makes the purchaser . . . liable for the sales tax. Section 6 of the Act requires the retailer to add the tax to the sales price and declares the tax to be a debt from the consumer to the retailer. Section 7 makes it unlawful for the retailer to hold out that he will absorb or refund the tax in whole or in part."

(N. Y.) 10, 13, which indicates, contrary to the conclusion reached in the *Buscaglia* decision, that the incidence of the New York State sales tax is upon the vendor.

We conclude that the incidence of the sales tax is upon the vendor. The plaintiff, therefore, is not entitled to an exemption under § 1, subsection 6 (a) of the Act. See cases cited, *supra*, at p.

B. Use tax.

The exemption in § 1, subsection 6 (a), for “[s]ales which the commonwealth is prohibited from taxing under the constitution or laws of the United States” is applicable also to the use tax. § 2, subsection 5 (b). In contrast to the sales tax, there is no doubt that the incidence of the use tax is upon the purchaser. The three per cent tax, designed to prevent the loss of sales tax revenue by out of State purchases, is imposed upon the storage, use or other consumption of tangible personal property within the Commonwealth. § 2, subsection 2. The purchaser or “user” is liable for the tax. § 2, subsection 2. It is his obligation to file a return and pay the tax. § 2, subsections 10 (a), 10 (c).¹⁶ The provisions contained in § 1, subsections 15-22, relating to the assessment, collection, and abatement of the sales tax, are expressly applied to purchasers liable for payment of the use tax. § 2, subsection 11.

Our conclusion that the incidence of the use tax is upon the purchaser raises the question whether the Constitution and laws of the United States permit such a tax to be im-

¹⁶ Under certain circumstances, a vendor doing business in the Commonwealth who makes sales which are subject to the use tax is required to collect the tax and give the purchaser a receipt therefor. § 2, subsection 4. Such a receipt relieves the purchaser from further liability for the tax to which the receipt refers. § 2, subsection 3. The amounts reimbursed by the purchaser to such vendors need not be stated in a return filed by the purchaser. § 2, subsections 10 (a), 10 (b).

posed upon the plaintiff and other national banks doing business within the Commonwealth. The plaintiff asserts that national banks are agencies and instrumentalities of the Federal government and as such cannot constitutionally be taxed by a State except as permitted by congressional legislation. *Central Natl. Bank v. Lynn*, 259 Mass. 1, 7-8. *Commissioner of Corps. & Taxn. v. Woburn Natl. Bank*, 315 Mass. 505, 506-507, and cases cited. *Owensboro Natl. Bank v. Owensboro*, 173 U. S. 664, 668. *Des Moines Natl. Bank v. Fairweather, Mayor*, 263 U. S. 103, 106. *First Natl. Bank v. Hartford*, 273 U. S. 548, 550. *Iowa-Des Moines Natl. Bank v. Bennett*, 284 U. S. 239, 244.

Virtually all of these decisions and the doctrine which they espouse rely ultimately on Chief Justice Marshall's noted opinion in *M'Culloch v. Maryland*, 4 Wheat. 316. That case arose when Maryland imposed a tax upon notes issued by banks not chartered by the State Legislature in an attempt to drive the second national bank from Maryland. This tax directly interfered with a function crucial to the success of the bank, for the issuance of notes was a principal means of obtaining capital to be utilized for loans or other profit making activities. Moreover, the tax was levied upon an institution to which Congress had delegated important governmental functions.¹⁷ In holding the tax invalid, Chief Justice Marshall recognized the grave danger to the Federal government from a discriminatory State tax

¹⁷ See Act of April 10, 1816, c. 44, 3 Stat. 266. For example, the United States owned twenty per cent of the capital stock of the second national bank. § 6. The President was empowered to appoint, subject to the approval of the Senate, five of the twenty-five directors of the bank. § 8. Notes issued by the bank were made legal tender for all Federal debts. § 14. The bank was made the depository of public funds of the United States. § 16. Upon the request of the Secretary of the Treasury, the bank was required to transfer public funds from place to place without charge. § 15.

levied on an important fiscal agent of the United States. See 4 Wheat. 316, 431. The Chief Justice did, however, acknowledge that inherent power existed in the States to lay certain taxes on such an instrumentality. 4 Wheat. 316, 436. Unfortunately, this decision, as well as the later case of *Osborn v. The Bank of the United States*, 9 Wheat. 738, in which the court held unconstitutional a discriminatory Ohio tax levied upon the bank, established a doctrine of absolute intergovernmental immunity, regardless of the nature of the tax, which was to flower for the ensuing century. This doctrine was later referred to by Justice Frankfurter as a "web of unreality . . . [which] withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism." *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 490.

The case of *Owensboro Natl. Bank v. Owensboro*, 173 U. S. 664, is to be read with this prior history in mind. There, in 1899, the Supreme Court held invalid a nondiscriminatory franchise tax of the State of Kentucky levied against a national bank created by the National Bank Act of 1863. The court, purporting to rely on its earlier decisions in the *M'Culloch* and *Osborn* cases, as well as in *Davis v. Elmira Sav. Bank*, 161 U. S. 375, held that a State is wholly without power to levy any tax upon national banks save that permitted by congressional act. No attempt was made to distinguish between the discriminatory taxes held invalid in the *M'Culloch* and *Osborn* cases and the tax levied by the State of Kentucky.

We do not believe we should be led by a blind reliance on stare decisis. The plaintiff cites no case in this century where the Supreme Court of the United States has struck down on constitutional grounds a nondiscriminatory State tax on a privately owned enterprise which is alleged to be

an instrumentality of the United States. On the other hand, the Supreme Court has in recent years curtailed sharply the application of the doctrine of implied intergovernmental immunity to instrumentalities of the Federal government. See *United States v. Allegheny County*, 322 U. S. 174, 176-177; Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 632; and Powell, The Remnant of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 757.

In addition, a metamorphosis has taken place in the nature and functions of national banks. There is little resemblance between the operation of today's national bank and that of the second national bank or of national banks at the time the *Owensboro* case was decided by the Supreme Court. It is thus our belief that the plaintiff's claim to immunity is to be judged according to contemporary conditions under principles enunciated in the more recent Supreme Court decisions relating to implied constitutional immunity of purported instrumentalities of the United States.

There has never been any doubt that a State cannot lay a tax upon the United States itself. *M'Culloch v. Maryland*, 4 Wheat. 316. *Mayo v. United States*, 319 U. S. 441. *United States v. County of Allegheny*, 322 U. S. 174. *Kern-Limerick, Inc. v. Scurlock, Commr. of Rev. for Arkansas*, 347 U. S. 110. Unfortunately there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax immune instrumentality of the United States. *Department of Employment v. United States*, 385 U. S. 355, 358-359.¹⁸ The appli-

¹⁸ See *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 522-524: "Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this Court has repeatedly held that those agencies through which either government immediately and

cation of the principle of implied immunity "has required the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both Nation and State under our dual system." *James, State Tax Commr. v. Dravo Contr. Co.* 302 U. S. 134, 150. Such a claim must be narrowly construed. "[T]he implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax. . . ." *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 483.

The plaintiff's claim to implied constitutional immunity rests on the authority of decisions, cited previously, which

directly exercises its sovereign powers, are immune from the taxing power of the other. . . .

"When, however, the question is approached from the other end of the scale, it is apparent that not every person who uses his property or derives a profit, in his dealings with the government, may clothe himself with immunity from taxation on the theory that either he or his property is an instrumentality of government within the meaning of the rule. . . .

"As cases arise, lying between the two extremes, it becomes necessary to draw the line which separates those activities having some relation to government, which are nevertheless subject to taxation, from those which are immune. Experience has shown that there is no formula by which that line may be plotted with precision in advance. . . .

"But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it."

characterized national banks as agencies and instrumentalities of the United States in construing their status under the National Bank Act.¹⁹ That Act was entitled: "An Act to provide National Currency, secured by a Pledge of United States Bonds, and to provide for the Circulation and Redemption thereof." It authorized the formation of national banks to be employed as depositories and financial agents of the Federal government, but especially to be employed in facilitating the collection of internal duties and the transfer and disbursement of public moneys, and in furnishing a safe and uniform note circulation. See *Van Allen v. The Assessors*, 3 Wall. 573, 582, 589-590. The functions conferred upon the national banks were not unlike those granted to their earlier predecessors, the United States Bank and the second United States bank. During the next half century the national banks played an important role in the establishment and supervision of national monetary policy. In addition, the banks performed some minor services beyond their enumerated powers pursuant to an authorization to exercise "all such incidental powers as shall be necessary to carry on the business of banking." Act of June 3, 1864, c. 106, § 8, 13 Stat. 101.

The Federal Reserve Act of 1913²⁰ reduced considerably the importance of national banks as fiscal agents of the United States. Welch, State and Local Taxation of Banks in the United States, New York Tax Commission: Special Report No. 7, p. 209. That Act, passed "To Provide for the establishment of Federal Reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of bank-

¹⁹ The Act was originally passed in 1863, Act of February 25, 1863, c. 58, 12 Stat. 665, but was amended considerably in 1864, Act of June 3, 1864, c. 106, 13 Stat. 99.

²⁰ Act of December 23, 1913, c. 6, 38 Stat. 251.

ing in the United States, and for other purposes," placed upon the Federal Reserve System the responsibility of establishing and maintaining a national fiscal and monetary system. In effect, the Federal Reserve System assumed in large part the functions and responsibilities conferred in earlier years on the first two banks of the United States and successor national banks.

The Federal Reserve System also assumed responsibility relative to the entire banking industry. No longer are national banks the exclusive depository of government funds but Federal reserve banks and all member banks, regardless of whether they are State or national banks, are authorized to be Federal depositories. § 15, 38 Stat. 265, as amended, 12 U. S. C. § 391 (1964). Although national banks are required to be members of the Federal Reserve System, State chartered banks may also become members. § 9, 38 Stat. 259, as amended, 12 U. S. C. § 321 (1964).

Ninety-five per cent of all banks are insured by the Federal Deposit Insurance Corporation. *United States v. Philadelphia Natl. Bank*, 374 U. S. 321, 327. See § 5, 64 Stat. 876, as amended, 12 U. S. C. § 1815 (1964). This in itself subjects these banks to extensive supervision and control. "State member and nonmember insured banks are subject to a federal regulatory scheme almost as elaborate as that which governs the national banks." *United States v. Philadelphia Natl. Bank*, 374 U. S. 321, 327. Professor Davis has called Federal supervision of banking "[p]robably the outstanding example in the federal government of regulation of an entire industry through methods of supervision."

¹ Davis, *Administrative Law Treatise*, § 4.04, at p. 247.

In exchange, it seems, for the transfer of governmental functions from the national banks to the Federal Reserve System, Congress broadened the powers of national banks to engage in general banking. Welch, *supra*, at pp. 33-35.

Almost thirty years ago the Supreme Court remarked that "[t]hough the national banks' usefulness as an agency to provide for currency has diminished markedly, their importance as general bankers shows a constant growth." *Colorado Natl. Bank v. Bedford*, 310 U. S. 41, 48. This growth dates from the passage of the Federal Reserve Act of 1913. Although the National Bank Act had prohibited national banks from making mortgage loans, Act of June 3, 1864, c. 106, § 28, 13 Stat. 108, the authority to make such loans was allowed in 1913 and expanded thereafter. § 24, 38 Stat. 273, as amended, 12 U. S. C. 371 (1964). See *Michigan Natl. Bank v. Michigan*, 365 U. S. 467, 471-472. The reduction of reserve requirements for "time" or "savings" deposits, see, e.g., § 19, 38 Stat. 270, as amended, 12 U. S. C. § 462 (1964), placed national banks in a better position to compete with State banks for savings accounts. The Federal Reserve Act also provided for the granting of fiduciary powers to national banks. § 11 (k), 38 Stat. 262, as amended. 12 U. S. C. § 92a (a) 1964. The McFadden Act of 1927 expressly allowed national banks to buy and sell securities other than Federal and State obligations. Act of February 25, 1927, c. 191, § 2, 44 Stat. 1226, as amended, 12 U. S. C. § 24 (1964).

The sum total of the changes wrought during this century has been the assumption by the Federal Reserve System of the role of fiscal agent for the Federal government. The relegation of national banks to their present status as general commercial bankers makes any difference between them and their State chartered competitors hard to discern. The similarities between them are infinitely striking. Given a national bank and a State chartered trust company operating in the same community, one may know that both will have savings departments paying interest generally at an

even rate. Both will engage in the business of commercial and real estate loans in competition. Both may have trust departments serving the same purpose. With the contemporary extension of the banking business into other allied fields both will compete in the area of similar sales and services. Both enjoy equal benefits from the protection of local and State government. Both are in business for the purpose of profit. In this highly mechanized day both will require expensive business machines either purchased in or without the State. Both will need real estate and attractive buildings in which to do business.

There are few dissimilarities. National banks are creatures of the Federal government in that they owe their very existence to congressional legislation. 12 U. S. C. § 21 (1964). They are required to be members of the Federal Reserve System. 12 U. S. C. § 222 (1964). The sole modern distinction of importance between the two lies in the fact that one is subject to Federal supervision, 12 U. S. C. §§ 21-215b (1964), while the other is supervised directly by the Massachusetts Commissioner of Banks under G. L. c. 167, §§ 1-11C.

We do not find these differences sufficient to exempt the plaintiff from the imposition of a nondiscriminatory tax of general application such as the use tax imposed by § 2 of the Act. That national banks were originally chartered by Congress is of historical interest but has little relevance in the determination of whether intergovernmental immunity should exist. *Railroad Co. v. Peniston*, 18 Wall. 5, 34. That they are required to join the Federal Reserve System makes them no more indispensable vehicles for effectuating national fiscal policy than the State chartered members of the system. In view of the increasingly massive Federal control over all aspects of the national economy, and particularly commercial banking, supervision by the Depart-

ment of the Treasury of what is otherwise a privately owned institution engaged in the pursuit of profit does not bring the plaintiff to the close relationship with the government necessary to imply immunity under the Constitution.

A comparison with the two recent instances in which the Supreme Court of the United States has granted an entity other than the United States status as a tax immune instrumentality reveals the weakness of the plaintiff's claim to immunity! *Standard Oil Co. of Cal. v. Johnson, Treas. of Cal.* 316 U. S. 481, involved an attempt by California to impose a tax on the privilege of distributing motor vehicle fuel on United States Army post exchanges. The court concluded, after a detailed examination of the activities of United States Army post exchanges, all of which were governmental in nature, that post exchanges "as now operated are arms of the Government deemed by it essential for the performance of governmental functions." 316 U. S. 481, 485. The holding of the court was not placed on constitutional grounds, the case being sent back for a further interpretation of the State statute in the light of the court's conclusion as to the status of post exchanges. Very recently the court held that the Red Cross is a Federal instrumentality for purposes of tax immunity. *Department of Employment v. United States*, 385 U. S. 355. It thus held invalid as applied to employees of the Red Cross a Colorado payroll tax designed to protect employment security.²¹ After reviewing its extensive and almost all pervasive relationship with the United States, Justice Fortas

²¹ In contrast to the status of employees of the Red Cross and other servants of the government which is peculiarly a matter of Federal concern, employees of national banks are expressly subjected to State unemployment laws. 26 U. S. C. § 3305 (e) (1964). See 26 U. S. C. § 3306 (e) (6) (1964).

found that the Red Cross functioned "virtually as an arm of the Government."²²

No contention can be made that the plaintiff functions as "an arm of the Government" as do the United States Army post exchanges or the Red Cross. Furthermore, there has been an unmistakable trend in recent Supreme Court decisions, many of which overrule earlier precedent, to deny implied constitutional immunity from State taxation to essentially private persons, both individual and corporate, who conduct businesses for profit and at the same time perform some governmental functions. In *James, State Tax Commr. v. Dravo Contr. Co.* 302 U. S. 134, the court sustained a West Virginia tax upon the income of a contractor derived from building locks and dams for the Federal government in that State. The cases of *Helvering, Commr. of Int. Rev. v. Gerhardt*, 304 U. S. 405, and *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, upset a century of precedents by permitting the application of the income

²² 385 U. S. 355, 359-360. In explaining why the Red Cross is a tax exempt instrumentality of the United States, Justice Fortas further stated: "Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense, then War, Department. 33 Stat. 599, as amended, 36 U. S. C. § 1, et seq. Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors. 33 Stat. 601, as amended, 36 U. S. C. § 5. By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government" (footnotes omitted) pp. 359-360.

taxes of each entity to employees of the other. The Supreme Court has held valid State sales and use taxes imposed upon contractors employed by the Federal government on a cost-plus-fixed fee basis even though the financial burden of the tax was passed on to the United States. *Alabama v. King & Boozer*, 314 U. S. 1 (sales tax). *Curry v. United States*, 314 U. S. 14 (use tax). See *United States v. Boyd, Commr.* 378 U. S. 39, 48-51. In *Oklahoma Tax Commn. v. Texas Co.* 336 U. S. 342, lessees of exempt Indian lands were held liable for State gross production and excise taxes on petroleum produced from such lands. More recently the court upheld a Michigan statute which imposed a real property tax on private parties using otherwise tax exempt property belonging to the Federal government. *United States v. Detroit*, 355 U. S. 466. *United States v. Muskegon*, 355 U. S. 484. *Detroit v. Murray Corp. of America*, 355 U. S. 489. The most striking of these Michigan cases is the one involving Muskegon. There the tax was sustained even though Continental Motors Corporation was using a government owned plant for the performance of government contracts without a lease or other cognizable property interest. "The vital thing," stated the majority, "is that Continental was using the property in connection with its own commercial activities. The case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a 'servant' of the United States in agency terms." 355 U. S. at p. 486.

The "Michigan cases" suggest that only a "servant" of the Federal government may gain Federal immunity. Van Cleve, *States' Rights and Federal Solvency*, 1959 Wis. L. Rev. 190, 206. At the least, they establish the proposition that privately owned corporations organized for profit which perform some governmental functions are not thereby

immunized from nondiscriminatory State taxes of general application. Well before these cases, Professor Thomas Reed Powell, in criticizing the absolute immunity doctrine, called for recognition that some governmental activity may be business activity and should not thereby be automatically withdrawn from State taxation. Powell, *The Waning of Intergovernmental Tax Immunities*, 58 Harv. L. Rev. 633, 651 ff. The coexistence of private and governmental functions has come to be recognized in other fields. For example, national banks have been held to be private corporations for various purposes of Federal law. See *United States v. Philadelphia Natl. Bank*, 374 U. S. 321 (anti-trust laws); *United States v. First Natl. Bank & Trust Co.* 376 U. S. 665 (anti-trust laws). See also *National Labor Relations Bd. v. Bank of America Natl. Trust & Sav. Assn.* 130 F. 2d 624 (9th Cir.) (labor law). In an age of increased Federal involvement in all aspects of the national economy, recognition of the coexistence of private and governmental functions is necessary in order that the States may not be deprived of needed revenue. See generally Pierce, *Tax Immunity Should Not Mean Tax Inequity*, 1959 Wis. L. Rev. 173. This recognition would tend to prevent a benefit from running to an essentially private interest at the expense of the taxing government and without a corresponding benefit to the government in whose name the immunity is claimed. See *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 483.

Such an approach also fosters a sound tax policy of equality which dictates that all business for profit within a State share the cost of government services provided to all. The importance of preserving this tax equality between business competitors was recognized by the Supreme Court in the "Michigan cases." "As suggested before the legislature apparently was trying to equate the tax burden im-

posed on private enterprise using exempt property with that carried by similar businesses using taxed property.

... In the absence of such equalization the lessees of tax-exempt property might well be given a distinct economic preference over their neighboring competitors, as well as escaping their fair share of local tax responsibility."

United States v. Detroit, 355 U. S. 466, 473-474. The plaintiff national bank enjoys the benefits of State and local services, the protection of the laws of the State, access to its courts, and the patronage of its citizens. That the plaintiff should escape a tax borne by its State chartered competitors, many of which are members of the Federal Reserve System, is manifestly unjust. Were it to be held that the use tax was not applicable to national banks the competitive disadvantage to which they would put their State chartered competitors is as obvious as it is inequitable. Moreover, equality helps to slow the rate of bank mergers and other efforts of State chartered banks to escape State supervision as well as obtain a commercial advantage. See *United States v. Philadelphia Natl. Bank*, 374 U. S. 321; *United States v. First Natl. Bank & Trust Co.* 376 U. S. 665.

We find nothing in the Constitution of the United States or the recent Supreme Court decisions interpreting it to prevent the application of the use tax to purchases made by the plaintiff and other national banks doing business in the Commonwealth. "There . . . [is] no discrimination against the Federal Government, its property or those with whom it does business. There . . . [is] no crippling obstruction of any of the Government's functions, no sinister effort to hamstring its power, not even the slightest interference with its property. Cf. *M'Culloch v. Maryland*, 4 Wheat. 316." *Detroit v. Murray Corp. of America*, 355 U. S. 489, 495. In fact, were we to construe subsection 5 (b) of § 2, or subsections 6 (d) and 6 (a) of § 1, to exempt

this small group of privately owned institutions which have neither the need nor the right to such protection, could it not be said that serious constitutional problems under the Fourteenth Amendment of the Constitution of the United States would arise?

IV. EXEMPTION UNDER 12 U. S. C. § 548 (1964).

Finally, we confront the question whether the application of the use tax to purchases made by national banks violates any law of the United States. The plaintiff asserts that Rev. Sts. § 5219, as amended, 12 U. S. C. § 548 (1964), prohibits the imposition of such a tax upon a national bank. That provision, dealing with State taxation of national bank shares, provides in relevant part as follows: "The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with: 1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause." (Subdivision [c] places certain limits on taxes measured by net income and requires that the tax rate not be higher on national banks than other financial, mercantile, manufacturing, and business corporations doing business within the State.)

We recognize that § 548 has been interpreted to be the extent to which Congress has permitted State taxation of national banks. *Commissioner of Corps. & Taxn. v. Woburn Natl. Bank*, 315 Mass. 505, 506-507, and cases cited.

Owensboro Natl. Bank v. Owensboro, 173 U. S. 664, 668-669. *Des Moines Natl. Bank v. Fairweather, Mayor*, 263 U. S. 103, 106. *First Natl. Bank v. Anderson, County Auditor*, 269 U. S. 341, 347. *First Natl. Bank v. Hartford*, 273 U. S. 548, 550-551. *Iowa-Des Moines Natl. Bank v. Bennett*, 284 U. S. 239, 244. *Colorado Natl. Bank v. Bedford*, 310 U. S. 41, 50-51. See *Michigan Natl. Bank v. Michigan*, 365 U. S. 467, 470; *Department of Employment v. United States*, 385 U. S. 355, 360. The soundness of this construction of § 548 has been questioned. Note, Schweppé, State Taxation of National Bank Stocks: Uncertainty of its Constitutional Basis, 6 Minn. L. Rev. 219. Traynor, National Bank Taxation in California, 17 Cal. L. Rev. 83, 84-94. The principle that § 548 stands as the outer limit of State power to tax national banks, first advanced in *Owensboro Natl. Bank v. Owensboro*, 173 U. S. 664, necessarily depends on the underlying premise that absent such a statute the Constitution of the United States would prohibit a tax levied upon a national bank. Only if that preliminary conclusion is made can § 548, which only purports to regulate taxation of national bank shares, be interpreted to forbid the States from imposing other taxes on national banks. As already pointed out, we do not believe that this underlying premise, that the Constitution confers immunity on national banks, remains valid when judged in the light of recent decisions of the Supreme Court of the United States.

From the recent trend of Supreme Court decisions restricting severely the doctrine of implied constitutional immunity has emerged a countervailing principle. In these decisions the Supreme Court, while curtailing immunity as a matter of constitutional law, has indicated that Congress, if it desires, may confer immunity by statute. *United States v. Detroit*, 355 U. S. 466, 474, 475. Congress "has under the Constitution exclusive authority to determine

whether and to what extent its instrumentalities . . . shall be immune from state taxation." *Maricopa County v. Valley Nail, Bank*, 318 U. S. 357, 361. *James, State Tax Commr. v. Dravo Contr. Co.* 302 U. S. 134, 160-161. *Pittman, Clerk of the Superior Court of Baltimore v. Home Owners' Loan Corp.* 308 U. S. 21, 32-33. *Oklahoma Tax Commn. v. United States*, 319 U. S. 598, 606-607. See, e.g., *Federal Land Bank v. Bismarck Lumber Co.* 314 U. S. 95; *Carson v. Roane-Anderson Co.* 342 U. S. 232; *Federal Land Bank v. Board of County Commrs. of Kiowa County, Kansas*, 368 U. S. 146.

Such immunity, however, must be expressly conferred. The Supreme Court of the United States has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co. v. Helvering, Commr. of Int. Rev.* 307 U. S. 57, 60. *Oklahoma Tax Commn. v. United States*, 319 U. S. 598, 606. This rule has been rigidly applied in the area of intergovernmental immunity. Congress has not created an immunity here by affirmative action, and "[t]he immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication. *Oklahoma Tax Commn. v. United States*, 319 U. S. 598, 604." *Oklahoma Tax Commn. v. Texas Co.* 336 U. S. 342, 366. "Silence of Congress implies immunity no more than does the silence of the Constitution. . . . [I]f it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 480.

Any construction of § 548 which would prohibit the imposition of a use tax upon a national bank must rest on implication since the section, by its terms, does not purport to prohibit any taxation. Such an implied prohibition

would be in marked contrast with numerous other statutory tax exemptions created by Congress.²³ The thrust of the recent decisions of the Supreme Court on intergovernmental tax immunity indicates that a statute like § 548 is not to be interpreted in a manner inconsistent with its express terms. For these reasons the application of the use tax to purchases made by the plaintiff does not violate any law of the United States.

V. CONCLUSION.

We are of the opinion that the plaintiff is not exempted from the taxes imposed by §§ 1 and 2 of the Act by virtue of subsections 6 (a) or 6 (d) of § 1, or of subsection 5 (b) of § 2. An interlocutory decree is to be entered overruling the demurrer. A final decree is to be entered declaring that emergency regulation No. 6 is valid in so far as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts sales and use taxes.

So ordered.

CUTTER, J. (concurring) The later part of the opinion of the court takes the position, with which I agree, that the Constitution of the United States and 12 U. S. C. § 548 (1964) do not prevent the imposition of a nondiscriminatory State use tax with respect to a situation or transaction in which a national bank has become the purchaser and user of tangible personal property. Similar considerations seem

²³ See, e.g., 12 U. S. C. § 531 (1964) (Federal reserve banks); 12 U. S. C. § 931 (1964) (Federal land banks); 12 U. S. C. § 931 (1964) (Federal land bank associations); 12 U. S. C. § 1433 (1964) (Federal home loan banks); 12 U. S. C. § 1464 (h) (1964) (Federal savings and loan associations); 12 U. S. C. § 1723 (c) (1964) (Federal National Mortgage Association); 12 U. S. C. § 1768 (1964) (Federal credit unions); 12 U. S. C. § 1825 (1964) (Federal Deposit Insurance Corporation).

to me to permit the imposition of a nondiscriminatory State sales tax with respect to a transaction in which a national bank is the purchaser of tangible personal property. I concur in the result of the opinion of the court on this ground which seems to me to be implicit in what the opinion of the court says about the use tax. In my view, there is no occasion to decide whether the legal incidence of the Massachusetts sales tax is upon such a national bank as a retail purchaser or upon its vendor.

Ronald H. Kessel (Alex J. McFarland with him) for the plaintiff.

David Berman, Assistant Attorney General, for the State Tax Commission.

Acts and Resolves.

STATUTE 1966, CHAPTER 14.

[Advance Copy, 1966 Massachusetts Acts and Resolves,
Pages 6-55.]

TAXATION OF RETAIL SALES OF TANGIBLE PERSONAL PROPERTY.

SECTION 1. A tax on retail sales is imposed in accordance with the following subsections:—

*Subsection 1. Definitions.—*When used in this section the following words, terms and phrases shall have the following meaning except where the context clearly indicates a different meaning:—

(14) “Sales price”, the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money or otherwise.

(c) In determining the "sales price" there shall be excluded . . . (iv) the amount of reimbursement of tax paid by the purchaser to the vendor under section; . . .

IMPOSITION AND RATE OF TAX.

Subsection 2. An excise is hereby imposed upon sales at retail of tangible personal property in this commonwealth by any vendor at the rate of three per cent of the gross receipts of the vendor from all such sales of such property, except as otherwise provided in this section.

Subsection 3. Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.

Subsection 4. For the purpose of adding and collecting the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof, to be reimbursed to the vendor by the purchaser, the following formula shall be in force and effect as follows:—

<i>Amount of Sale.</i>	<i>Amount of Tax.</i>
\$0.01 to \$0.18 inclusive	No tax
.19 to .38 inclusive	1 cent
.39 to .78 inclusive	2 cents
.79 to 1.18 inclusive	3 cents

In addition to a tax of three cents on each full dollar, a tax shall be collected on each part of a dollar in excess of a full dollar in accordance with the above formula.

Subsection 5. Upon each sale of tangible personal property taxable under the provisions of this section the amount of tax collected by the vendor from the purchaser under the provisions of this section shall be stated and charged separately from the sales price and shown separately on any record thereof at the time the sale is made, or on any evidence of sale issued or used by the vendor.

Subsection 6. Exemptions.—The following sales and the gross receipts therefrom shall be exempt from the tax imposed by this section:—

(a) Sales which the commonwealth is prohibited from taxing under the constitution or laws of the United States.

(d) Sales to the United States, the commonwealth of Massachusetts or any political subdivision thereof, or their respective agencies.

(e) Sales to any corporation, foundation, organization or institution, organized exclusively for religious, scientific, charitable or educational purposes, including hospitals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; . . .

(t) Sales of tangible personal property through coin operated vending machines at ten cents or less, provided the retailer is primarily engaged in making such sales and keeps records satisfactory to the commission.

REGISTRATION OF VENDORS.

Subsection 7. Registration of Vendors.—(a) Application for Registration. No person shall do business in this

commonwealth as a vendor unless a registration or registrations shall have been issued to him as hereinafter described. Every person desiring to do business in this commonwealth as a vendor shall file with the commissioner for each place of business an application for registration, in such form as the commissioner with the approval of the commission, prescribes, giving such information as the commissioner requires. At the time of making the application, such person shall pay to the commissioner a registration fee of one dollar for each registration.

(b) *Issuance of Registration.* After compliance with the provisions of paragraph (a) by the applicant, the commissioner may issue to such applicant a separate certificate of registration for each place of business within the commonwealth. The certificate of registration shall not be assignable; shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein; and shall at all times be conspicuously displayed at the place for which issued.

(c) *Suspension or Revocation of Registration.* The commissioner may suspend or revoke the registration of any person or may refuse to issue any such registration for failure to comply with the provisions of this section or with all pertinent rules and regulations of the commission promulgated hereunder. Any person aggrieved by such suspension, revocation or refusal may, within ten days after written notice thereof has been mailed or delivered to him, apply to the commission for a hearing setting forth in such application a full statement of the grounds on which he intends to rely; provided, that he has filed with the commission at the time of making such application a surety company bond running to the commonwealth, with a surety company authorized to do business in the commonwealth as surety, in such sum as the commission shall fix, conditioned upon the payment of all taxes then due

under this section and to become due during the pendency of such appeal to the commission and of any further appeal to the appellate tax board or to the supreme judicial court. After such hearing, the commission shall give written notice of its decision. Any person aggrieved by a decision of the commission under this section may appeal therefrom to the appellate tax board within ten days after such written notice has been mailed or delivered to him. Such appeals to the appellate tax board shall be preferred cases to be heard, unless cause appears to the contrary, in priority to other cases. During the pendency of any such appeal to the commission or to the appellate tax board or to the supreme judicial court, the suspension or revocation so appealed from shall be inoperative. In the case of an appeal from the refusal of the commissioner to issue a registration, the commissioner shall issue such registration during the pendency of the appeal.

A person whose registration has been suspended or revoked shall pay to the commissioner a fee of five dollars for the reissuance of a registration. The commissioner shall not issue a new registration after the suspension or revocation of a registration unless he is satisfied that the former holder of the registration will comply with the provisions of this section and with all pertinent rules and regulations thereunder.

(d) *Failure to Register.* Any person who fails to register as required by this subsection and does business in this commonwealth as a vendor shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars. The superior court may on petition of the commissioner restrain such person from doing business as a vendor in this commonwealth.

RETURNS AND PAYMENT OF TAX.

Subsection 9. Filing of Returns.—On or before the twentieth day of each calendar month, each vendor who has made any sale at retail taxable under the provisions of this section during the preceding calendar month shall file a return with the commissioner. Such returns shall be filed upon a form furnished by the commissioner and approved by the commission and containing such information reasonably necessary for the administration of this section as the commissioner may require. The commission may by regulation require returns under this section to be filed on a quarterly rather than a monthly basis. Upon application of a vendor, the commissioner may issue a classified permit establishing such vendor's percentage of exempt sales. Such classified permits may be amended or revoked as to classification whenever the commissioner shall determine that the percentage of exempt sales is inaccurate or that such classification is not appropriate.

Subsection 10. Payment of Tax.—At the time of filing his return as provided by this section, the vendor shall pay to the commissioner the taxes imposed by this section. The taxes for the period for which a return is required to be filed by a vendor under this section shall be due and payable to the commissioner on the date established for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of gross receipts and taxes due thereon.

Subsection 14. Compensation for Collecting Tax.—For the purpose of defraying in whole, or in part, his expenses in keeping the records prescribed and collecting and remitting the tax imposed by this section, the taxpayer shall be

entitled to deduct and withhold from the taxes otherwise due from him two per cent thereof, provided he has complied with all of the requirements of this section and all pertinent rules and regulations of the commission promulgated hereunder.

Subsection 15. Assessment of tax.—(a) In General.—The tax imposed by this section shall be deemed to be assessed at the amount shown as the tax due on the return filed under the provisions of this section and on any amendment, correction or supplement thereof or at the amount properly due under this section; whichever is less.

(b) Assessment of Deficiencies.—If the commissioner determines from the verification of a return, or otherwise, that the full amount of any tax due under this section, or any portion thereof, has not been assessed or is not deemed to be assessed, he may, at any time within three years after the date the return was filed or the date it was due, whichever occurs later, assess the same with interest as provided in subsection nineteen to the date when the deficiency assessment is required to be paid hereunder, first giving notice to the vendor to be assessed of his intention; and such vendor or a representative of the vendor shall thereupon have an opportunity, within thirty days after the date of such notification, to confer with the commissioner or his duly authorized representative as to the proposed assessment. After the expiration of thirty days from the date of such notification, the commissioner shall assess the amount of the tax remaining due the commonwealth, or any portion thereof, which he believes has not theretofore been assessed and shall give notice to the vendor so assessed. One or more deficiency assessments may be made of the amount due for one or for more than one period. Any tax so assessed shall be paid to the commissioner within fourteen days after the date of the notice of assessment.

In the case of an arithmetic or clerical error apparent upon the face of the return, the commissioner may assess a deficiency attributable to such error without giving prior notice of his intention to the vendor to be assessed.

(c) *Refund of Overpayments.*—If, on the verification of a return, or otherwise, the commissioner determines that an overpayment of the full amount of any tax, and interest and penalties thereon, due under this section with respect to such return has been made by the vendor, the amount of such overpayment may, in his discretion, be deducted from any unpaid amounts due for other periods or on other returns of the vendor. The balance of such overpayment shall be refunded to the vendor if it exceeds ten dollars; if such balance is ten dollars or less, it may be refunded in the discretion of the commissioner. Interest upon such refund at six per cent per annum shall be paid from a date six months after the date of the payment of said amount to the commissioner, the date upon which the return was due or the date upon which the return was filed, whichever is the latest.

(d) *Extension by Agreement.*—If, before the expiration of the time prescribed under paragraph (b) for the assessment of any deficiency, the commissioner and the vendor consent in writing to extend the time for the assessments of any deficiency, the commissioner or his duly authorized representative may inspect and examine the records of the vendor as provided in subsection twelve, may give any notice of intention to assess required by this subsection and may assess any deficiency at any time prior to the expiration of the extended time. The period so extended by the commissioner and the vendor may be further extended by subsequent agreements in writing made before the expiration of the time last extended.

(e) *Exceptions to Assessment Limitation.*—The commissioner may assess the tax imposed by this section at any time if a vendor has filed no return; has filed a false or fraudulent return with intent to evade the tax imposed by this section; or has filed a return with a wilful attempt in any manner to defeat or evade the tax imposed by this section.

(f) *Notice of Assessment.*—If the assessment of any tax is in excess of the amount shown on the return as the tax due, the commissioner shall, as soon as may be, give written notice to the vendor of the amount of the assessment, the amount of any balance due and the time when the same is required to be paid, but failure to receive such notice shall not affect the validity of the tax.

Subsection 16. Collection of Unpaid Taxes.—Assessed taxes remaining unpaid after the date upon which the same are required to be paid shall bear interest at the rate of six per cent per annum until paid, which shall be added to and become part of the tax. Every person who fails to pay to the commissioner any sums required by this section shall be personally and individually liable therefor to the commonwealth. The term "person", as used in this subsection, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee or member is under a duty to pay over the taxes imposed by this section.

Subsection 17. Remedies for Collection.—The commissioner shall have for the collection of taxes imposed by this section all the powers and remedies provided by chapter sixty of the General Laws for the collection of taxes on personal estate by collectors of taxes of towns. Any warrant for the collection of a tax imposed under this section may be issued to any deputy collector, sheriff, deputy sheriff or constable, and he shall have authority to proceed thereunder anywhere within the commonwealth. The offi-

cer, to whom a warrant for the collection of such a tax is given, shall collect said tax, penalties and interest as herein provided, including the charges and fees provided in section fifteen of chapter sixty, and shall pay over such amounts collected to the commissioner. Such officer, other than a deputy collector, may collect and receive for his fees the sum which an officer would be entitled by law to receive upon an execution for a like amount.

The commissioner may recover any tax imposed by this section in an action of contract in the name of the commonwealth. Any tax imposed by this section may also be collected by any information brought in the supreme judicial court by the attorney general at the relation of the commissioner. The court may issue an injunction upon such information, restraining the further prosecution of the business of the vendor until such taxes, with interest and costs thereon, have been paid.

Interest, penalties and additional taxes imposed under this section may be recovered in the manner provided for in this subsection.

Subsection 18. Jeopardy Assessments.—If the commissioner believes that the collection of any tax imposed by this section will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest and penalties, the assessment of which is provided for by law). Such tax, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the commissioner for the payment thereof. Upon failure or refusal to pay such tax, penalty and interest, the commissioner shall proceed forthwith to the collection thereof.

Subsection 19. Interest and Penalties.—(a) Interest.—All taxes imposed by this section shall be due and payable on or before the due date of the return, determined without regard to any extension of time. The portion of any taxes not paid on or before said date shall bear interest from said date at the rate of one half of one per cent per month, or major fraction thereof, until it is paid. Deficiency assessments made under subsection fifteen and additional taxes assessed under paragraph (c) of this subsection shall include interest as provided in this subsection to the date when the tax so assessed or any unpaid balance thereof is required to be paid. Interest so assessed shall become a part of the tax.

(b) Penalty for Late Returns.—If any vendor required to file a return under this section fails to file such return within the time prescribed by this section, there shall be added to and become a part of the tax, as an additional tax, a sum equal to one half of one per cent of the tax ultimately determined to be due for each month, or major fraction thereof, that the vendor is in default, but not less than ten dollars.

(c) Additional Tax.—If a vendor who has been notified by the commissioner that he has failed to file a return or has filed an incorrect or insufficient return, refuses or neglects within thirty days after the date of such notification to file a proper return, or if a vendor has filed a false or fraudulent return or has filed a return with a wilful attempt in any manner to defeat or evade the tax, the commissioner shall determine, according to his best information and belief, the sales and gross receipts of such vendor taxable under this section and shall assess the same at not more than double of the amount so determined, which additional tax shall be in addition to the other penalties provided by this section.

Subsection 20. Abatement of Taxes.—If the tax shown on the return filed by any person pursuant to this section is believed to be excessive or illegal, such person may apply in writing to the commission, upon a form approved by the commission, for an abatement thereof at any time within three years from the last day for filing such return, determined without regard to any extension of time. Any person aggrieved by the assessment of any tax imposed by this section may apply in writing to the commission, upon a form approved by the commission, for an abatement thereof at any time within two years after the date upon which the notice of assessment is sent. The commission shall, if requested, give the applicant a hearing upon his application; and if the commission finds that the tax is excessive in amount or illegal, the commission shall abate the tax in whole or in part accordingly.

If an abatement is granted and the tax has been paid, the state treasurer, upon certification of the commission, shall repay to the person who paid the tax the amount of such abatement, with interest thereon at the rate of six per cent per annum from the time when it was paid; provided, that if such person is a vendor who has collected reimbursement of such tax, no actual refund of money shall be made to such vendor until he shall first establish to the satisfaction of the commission, under such regulations as it may prescribe, that the vendor has repaid to the purchaser the amount for which the application for refund is made. In lieu of any refund required to be made, a credit may be allowed therefor on payment due from the applicant. The commission shall give notice to the applicant of its decision upon any application for abatement under this subsection.

Subsection 21. Limitation of Abatements.—No tax assessed on any person liable to taxation under this section

shall be abated in any event unless the person assessed shall have filed, at or before the time of bringing his application for abatement, a return as required by subsection nine for the period to which his application relates; and if he failed without good cause to file his return within the time prescribed by law, or filed a fraudulent return, or having filed an incorrect or insufficient return, has failed, after notice, to file a proper return, the commission shall not abate the tax below double the amount for which the person assessed was properly taxable under this section.

Subsection 22. Appeal to Appellate Tax Board.—Any person aggrieved by the refusal of the commission to abate, in whole or in part, under subsection twenty a tax assessed or collected under this section, may appeal therefrom within ninety days after the date of the notice of the decision of the commission, or within six months after the time when the application for abatement is deemed to be denied, as provided by section six of chapter fifty-eight A of the General Laws, by filing a petition with the clerk of the appellate tax board. If, on hearing, said board finds that the person making the appeal was entitled to an abatement under subsection twenty from the tax assessed on him, it shall make such abatement as it sees fit. Findings of fact of the appellate tax board shall be final and conclusive, and shall be communicated in writing to the petitioner and the commission within five days thereafter. If a tax so abated has been paid, the state treasurer, upon presentation to him of the notice of the decision of the board, shall repay to the petitioner the amount of the abatement and interest at the rate of six per cent per annum from the date of payment or the due date of the return, whichever is later.

The remedies provided by this subsection and subsections twenty and twenty-one shall be exclusive.

PROHIBITION AND PENALTIES.

Subsection 23. Unlawful Advertising.—It shall be unlawful for any vendor to advertise or hold out or state to the public or any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the vendor or that it will not be added to the selling price of the property sold or, if added, it or any part thereof will be refunded. Whoever violates any provision of this subsection shall be punished by a fine of not more than one hundred dollars for each offense.

TAXATION OF THE STORAGE, USE OR OTHER CONSUMPTION OF TANGIBLE PERSONAL PROPERTY.

SECTION 2. A tax on the storage, use or other consumption of tangible personal property is imposed in accordance with the following subsections:

IMPOSITION AND LIABILITY FOR TAX.

Subsection 2. Imposition and Rate of Tax.—Except as otherwise provided in this section an excise is hereby imposed upon the storage, use or other consumption in this commonwealth of tangible personal property purchased from any vendor for storage, use or other consumption within this commonwealth at the rate of three per cent of the sales price of the property.

Subsection 3. Liability of User.—Every person storing, using or otherwise consuming in this commonwealth tangible personal property purchased from a vendor shall be liable for the tax imposed by this section. His liability shall not be extinguished until said tax has been paid to the commissioner, except that a receipt from a vendor en-

gaged in business in this commonwealth or from a vendor who is authorized by the commissioner, under such regulations as the commission may prescribe, to collect the tax and who is, for the purposes of this section, regarded as a vendor engaged in business in this commonwealth, given to the purchaser pursuant to subsection four of this section, shall be sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

Subsection 4. Liability of Vendor.—Every vendor engaged in business in this commonwealth and making sales of tangible personal property for storage, use or other consumption in this commonwealth not exempted under this section, shall at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the commissioner. The tax required to be collected by the vendor shall constitute a debt owed by the vendor to this commonwealth. For the purpose of uniformity of tax collection by the vendor and for other purposes the provisions of subsections three, four and five of section one are hereby incorporated in and made applicable to this section.

EXEMPTIONS.

Subsection 5. Exemptions.—The tax imposed by this section shall not apply to the following:

- (a) Sales upon which taxes are imposed under section one of this act.
- (b) Sales exempt from the taxes imposed under section one of this act; . . .

RETURNS AND PAYMENT OF TAX.

Subsection 9. Returns and Payment of Tax.—The provisions of subsections nine, ten, eleven and thirteen of section one of this act are hereby incorporated in and made applicable to this section. Every vendor who is required or expressly authorized to pay the tax imposed by this section shall file returns and pay the tax in accordance with the provisions of such subsections applicable to the filing of returns and the payment of the tax and as shall be prescribed by regulations of the commission.

Subsection 10. Monthly Returns—Content and Form—Payment of Tax by Purchaser.—(a) *Filing Returns.*—Every purchaser who is required to pay a tax under this section shall file a return with the commissioner within twenty days after the end of each calendar month. Such returns shall show the total sales prices of all tangible personal property purchased at retail sale upon which the tax imposed has not been paid by the purchaser to vendors, the amount of tax for which the purchaser is liable, and such other information as the commissioner deems necessary for the computation and collection of the tax. The commission may by regulation require returns under this subsection to be filed on a quarterly rather than a monthly basis.

(b) *Contents of Return.*—The return filed by a purchaser shall include the sales prices of all tangible personal property purchased as taxable retail sale during the calendar month or other period for which the return is filed and upon which the tax imposed has not been reimbursed by the purchaser to vendors.

(c) *Payment of Tax.*—At the time of filing his return as provided in this subsection the purchaser shall pay to the commissioner the amount of tax for which he is liable as shown by the return.

ASSESSMENT, COLLECTION, ADMINISTRATION, ENFORCEMENT,
ABATEMENTS AND APPEALS.

Subsection 11. The assessment and collection of the tax imposed by this section, the administration and enforcement thereof, the abatement of taxes imposed by this section, and the rights and procedure for appeals shall be governed by the provisions of subsections fifteen to twenty-two, inclusive, of section one of this act, which provisions are hereby incorporated in and made applicable to this section. For the purposes of this section said provisions shall be construed to apply to any purchaser who becomes liable to taxation under this section.

PROHIBITION AND PENALTIES.

Subsection 12. Unlawful Advertising.—It shall be unlawful for any vendor to advertise or hold out or state to the public or any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the vendor or that it will not be added to the selling price of the property sold or, if added, it or any part thereof will be refunded. Whoever violates any provision of this subsection shall be punished by a fine of not more than one hundred dollars for each offense.

Subsection 13. Criminal Penalties.—Any vendor or purchaser who wilfully fails to file a return required by this section when due, or wilfully files an incorrect or insufficient return, or with intent to evade taxation, files no return or a false or fraudulent return or submits a false certificate, affidavit or other statement to the commissioner or the commission relating to the amount of tax for which he is liable, shall be punished by a fine of not less than one hundred nor more than ten thousand dollars, or by imprisonment for not more than one year, or both.

STATUTE 1966, CHAPTER 483.

[Advance Copy, 1966 Acts and Resolves, Pages 453-454.]

SECTION 1. Subsection 3 of section 1 of chapter 14 of the acts of 1966 is hereby amended by adding the following paragraph:—

Notwithstanding the provisions of this subsection, the excise imposed by subsection two of this section or by subsection two of section two upon sales at retail, or upon the storage, use or other consumption of motor vehicles or trailers shall be paid by the purchaser to the registrar of motor vehicles in the manner prescribed by the commissioner. The vendor thereof shall not add the tax to the sales price and shall not collect the tax from the purchaser. The vendor thereof shall, however, furnish to the purchaser, the registrar and the commissioner a sworn statement of the sale upon a form prescribed by the commissioner, with the approval of the commission, giving such information as the commissioner may require for the determination of such tax.

SECTION 2. This act shall take effect on November first, nineteen hundred and sixty-six. *Approved August 8, 1966.*

Massachusetts Sales and Use Tax Emergency Regulations.**EMERGENCY REGULATION No. 6*****National Banks—Federal Savings and Loan Associations***

The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax.

National banks and Federal savings and loan associations making sales of tangible personal property must collect the sales tax to the same extent as other vendors making such sales.

STATE TAX COMMISSION
Guy J. Rizzotto,—Chairman
Leo E. Diehl
Donald T. Wood

May 31, 1966

A true copy

Attest:

Neil P. Shea
Executive Assistant
Massachusetts State Tax Commission

United States Code, Title 12—Banks and Banking.**NATIONAL BANK SHARES****§ 548. State taxation.**

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and

business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R. S. § 5219; Mar. 4, 1923, ch. 267, 42 Stat. 1499; Mar. 25, 1926, ch. 88, 44 Stat. 223.)

Judgment—Rescript.

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON,

July 27, 1967.

IN THE CASE OF

FIRST AGRICULTURAL NATIONAL BANK OF BERKSHIRE COUNTY

vs.

STATE TAX COMMISSION

pending in the Supreme Judicial Court for the County of
Suffolk

ORDERED, that the following entry be made in the docket;
viz,—

Interlocutory decree to be entered overruling the de-
murrer.

Final decree to be entered in accordance with the opinion.

BY THE COURT,

RICHARD A. McLAUGHLIN,

Clerk

July 27, 1967

Final Decree.

No. 69316 Equity

FIRST AGRICULTURAL BANK OF BERKSHIRE COUNTY

V.

STATE TAX COMMISSION

FINAL DECREE

This cause came on to further heard upon the rescript and opinion of the full bench and was argued by counsel; and thereupon, upon consideration thereof, it is ORDERED, ADJUDGED and DECREED:

1: Emergency regulation No. 6, of the State Tax Commission is valid in so far as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts sales and use taxes, St. 1966, c. 14, secs. 1 and 2.

By the Court, (Spiegel, J.)

JOHN E. POWERS,

Entered: August 9, 1967

Clerk

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1967

No. 755

FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

Appellee.

on appeal from the Supreme Judicial Court for the
Commonwealth of Massachusetts.

MOTION FOR LEAVE TO FILE BRIEF
AND BRIEF OF
COLORADO BANKERS ASSOCIATION
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANT'S
JURISDICTIONAL STATEMENT

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Of Counsel:

Bruce T. Buell

*Attorney for Colorado Bankers
Association, Applicant*

December, 1967

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MOTION FOR LEAVE TO FILE BRIEF OF
COLORADO BANKERS ASSOCIATION
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANT'S
JURISDICTIONAL STATEMENT

The Colorado Bankers Association respectfully moves for leave to file the accompanying brief *amicus curiae* in support of appellant's jurisdictional statement. The consent of appellant has been obtained; consent of the appellee has been refused. Notwithstanding the lack of appellee's consent, applicant submits that it represents interests of its members and others who are or probably will be faced with local tax law changes on the strength of the holding of the Massachusetts Supreme Judicial Court in the case at bar, all of which bespeak applicant's participation herein.

Applicant is an unincorporated trade association which includes in its membership two hundred fourteen of the two hundred sixteen commercial banks in Colorado. One hundred sixteen of these banks have national charters and ninety-seven have state charters. Within the City and County of Denver all commercial banks, fifteen national and ten state, are members of applicant.

During the months of November and December, 1967, the City and County of Denver took the following actions affecting the liability of national banks in Denver for city sales and use taxes:¹

- a. On November 21, 1967, the Manager of Revenue, City and County of Denver, issued an order, to become effective January 1, 1968, repealing all prior bulletins, letters, instructions, rules and regulations exempting national banks from the incidence of the city sales and use tax. (National banks had been exempt from these taxes from their inception under such rules and regulations.)
- b. The Denver City Council enacted ordinances, introduced on November 20, 1967, and effective December 2, 1967, which repealed exemptions in the city sales and use tax ordinances pertaining to sales and uses which Denver would be prohibited from taxing under the Constitution or laws of the United States or the State of Colorado. The announced intention of these repealing ordinances was to support the order of the Manager of Revenue cited above.

Upon information and belief, applicant avers that these actions by the Manager of Revenue and the City Council of Denver, were undertaken upon the strength of the hold-

¹Also affected are state banks and other financial institutions, but inasmuch as they are not subject to the case at bar, attention will be focused exclusively upon the effects on national banks. The Denver Lodger's Tax was also the subject of simultaneous changes, but again national banks are not affected by this tax and further mention will be omitted herein.

ing of the Massachusetts Supreme Judicial Court in the case at bar. Thus, said holding has substantially affected the interests of applicant's national bank members within the City and County of Denver. The actions detailed above will, as of January 1, 1968, cause national banks located in the City and County of Denver for the first time to become liable for payment of city sales and use tax on the purchases and use of all tangible personal property thereafter acquired by such banks. This raises the precise issue presented in the instant case, to-wit: May a state or political subdivision impose and collect sales and use taxes on purchases by national banks, or are such taxes invalid as being repugnant to the Constitution and laws of the United States?

Applicant is aware that this motion is filed several weeks after the filing by appellant of its jurisdictional statement on October 23, 1967. Applicant submits that this delay was unavoidable and this motion could not have been filed prior to or simultaneously with appellant's jurisdictional statement because the actions detailed above by the City and County of Denver giving rise to applicant's interest in this case did not occur until late November and early December, 1967.

Applicant asserts that these facts and the questions of law arising therefrom have not been and cannot adequately be presented by the parties because of their remoteness from the locus of these events and the current nature of the developments recited above. Applicant further submits that the facts and issues arising out of events in the City and County of Denver, Colorado, relating to the imposition of sales and use taxes on national banks, parallel the facts and issues set forth in the jurisdictional statement of appellant to a sufficient degree that they buttress the substantiality and importance of the questions raised by the decision of the Massachusetts Supreme Judicial Court.

Accordingly, the Court is urged to accept the brief of

— 4 —

applicant *amicus curiae* in support of appellant's jurisdictional statement, and to give plenary consideration to the matter upon the merits.

Respectfully submitted,

JAMES LAWRENCE WHITE
Attorney for Colorado Bankers
Association, Applicant

500 Equitable Building
Denver, Colorado 80202

Of Counsel:

Bruce T. Buell

IN THE

Supreme Court of the United States

October Term, 1967

No. 755

FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

Appellee.

on appeal from the Supreme Judicial Court for the
Commonwealth of Massachusetts.

BRIEF OF COLORADO BANKERS ASSOCIATION
AS AMICUS CURIAE
IN SUPPORT OF APPELLANT'S
JURISDICTIONAL STATEMENT

The interest of the Colorado Bankers Association in this case is set forth in its motion to which this brief is annexed.

OPINION BELOW AND JURISDICTION

Amicus adopts the text set forth in appellant's jurisdictional statement regarding the opinion below and jurisdiction of this Court.

STATUTES INVOLVED

Amicus adopts the text set forth in appellant's jurisdictional statement regarding the statutes involved. In addi-

tion, for the purposes of this brief, *amicus* asserts that the following ordinances of the City and County of Denver are involved: Ord. 437, Series of 1964 (Article 166, Revised Municipal Code of the City and County of Denver—Sales Tax) (App. 10), Ord. 438, Series of 1964 (Article 166A, Revised Municipal Code of the City and County of Denver—Use Tax) (App. 12), Ord. 412 and 413, Series of 1967 (App. 14). The regulations and orders of the Manager of Revenue involved are Section 0, Guide V, Denver Sales, Use and Lodger Tax Auditors Guide (1966) (App. 15) and Order dated November 21, 1967 (App. 16).

QUESTIONS PRESENTED

Amicus adopts the questions set forth in appellant's jurisdictional statement. In addition, for the purposes of this brief, the question presented is whether the City and County of Denver may impose and collect sales and use taxes on purchases by national banks located in Denver when the legal incidence of these taxes falls on such banks as purchasers.

STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in appellant's jurisdictional statement. In addition, *amicus* asserts that its national bank members in the City and County of Denver face the burden of city sales and use taxes commencing January 1, 1968, by virtue of recent actions taken by the Denver City Council and Manager of Revenue on the strength of the holding in the case at bar.

1. *Material Facts.* From the inception of the Denver Sales Tax in 1948 and the Denver Use Tax in 1962, national banks located in Denver have been exempt from the incidence of these city taxes. This exemption has rested on regulations of the Manager of Revenue, the most recent form of which is set forth at page 15 of the appendix. On

November 21, 1967, the Manager of Revenue ordered that this exemption be repealed. (App. 16).

Simultaneously with the Manager of Revenue's order, the City Council repealed exemptions appearing as subsections 166.11-3 and 166A.3-3(16) of the Revised Municipal Code. These exemptions pertained to sales and uses which Denver would be prohibited from taxing under the Constitution or laws of the United States or the State of Colorado. The exemptions appear at pages 11 and 13 of the Appendix and the repealing ordinances are set forth at page 14.

2. *Proceedings.* No proceedings have as yet been instituted by or against the City and County of Denver regarding these taxes because January 1, 1968, is the effective date of the Manager of Revenue's order. Nevertheless, he has announced his intention to enforce his order on said date and *amicus* is advised that litigation will be initiated by national banks located in Denver.

ARGUMENT

The Questions are Substantial and Important

A. *Amicus* adopts the argument of appellant in its jurisdictional statement regarding the substantiality and importance of the questions presented.

B. *A Decision by this Court Will Clarify the Authority of the City and County of Denver and other Local and State Taxing Entities to Levy Sales and Use Taxes on National Banks and Will Eliminate Additional Litigation.*

The facts which *amicus* seeks to bring to the attention of this Court underscore the importance of this Court giving plenary consideration to the questions presented by the case at bar.

The City and County of Denver is but one of a myriad of local and state entities imposing sales and use taxes. Denver, like the State of Colorado, has traditionally exempted national banks from the incidence of these taxes.² This exemption has been grounded upon the Federal Constitution and statutes as construed by this Court in a long line of cases including one directly involving Colorado. *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41.

The case at bar has cast doubt on the authority of the decisions of this Court and has provided authority upon which the City and County of Denver has felt justified to act in repealing the exemption for national banks. This will provoke litigation paralleling that in Massachusetts which will be laid to rest only with a determinative resolution of the questions presented herein.

While the interests of only fifteen national banks are directly affected by the Denver case, *amicus* supports the contention of appellant that national banks in many other local and state jurisdictions face legislative, regulatory or judicial determinations affecting their liability for sales and use taxes. Thus, plenary consideration by this Court of the case at bar will have merit in lending definite guidance to such determinations and eliminating litigation arising therefrom.

CONCLUSION

For the aforementioned reasons it is respectfully submitted that the questions presented in the case at bar are

²Colorado declares national banks to be exempt from state sales and use taxes because of the banks' status as federal instrumentalities. Rule No. 41, Colorado Director of Revenue.

so substantial and of such importance as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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Of Counsel:

Bruce T. Buell

Attorney for
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Amicus Curiae

500 Equitable Building
Denver, Colorado 80202

APPENDIX

Ordinance No. 437, Series of 1964

**Article 166, Revised Municipal
Code of the City and County of Denver**

Article 166 — Sales Tax

* * *

166.10. *Taxable Items.* On and after January 1, 1948; there is hereby levied and there shall be collected and paid a tax in the amount stated in Section 166.13 hereof [2%] as follows:

—1. On the purchase price paid or charged upon all sales and purchases of tangible personal property at retail.

* * *

—6. Upon the furnishing, for any consideration, of tangible personal property together with the services of an operator thereof, for another person....

* * *

166.11. *Items Exempt from Taxation.* There shall be exempt from taxation under the provisions of this article the following:

—1. All sales to the United States government, to the State of Colorado, its departments and institutions, and the political subdivisions thereof in their government capacities only.

—2. All sales made to religious, charitable and eleemosynary corporations, in the conduct of their regular religious, charitable or eleemosynary functions.

—3. All sales which the city is prohibited from taxing under the Constitution or laws of the United States or the State of Colorado.

* * *

166.13-2. Retailers shall add the tax imposed hereby, or the average equivalent thereof, to the sale price or charge, showing such tax as a separate and distinct item, and when added such tax shall constitute a part of such price or charge and shall be a debt from the consumer or user to the retailer until paid and shall be recoverable at law in the same manner as other debts. (Ord. 395, Series of 1967).

* * *

166.15. *Unlawful to Assume or Absorb Tax.* It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this article will be assumed or absorbed by the retailer, or that it will not be added to the selling price of the property sold, or, if added, that it or any part thereof will be refunded. Any person violating any provision of this article shall be subject to the penalties herein provided.

Ordinance No. 438, Series of 1964

Article 166A, Revised

**Municipal Code of the
City and County of Denver**

Article 166A — Use Tax

* * *

166A.3-1. *Legislative Intent*

—1(1) It is hereby declared to be the legislative intent of the Board of Councilmen that for the purposes of this article, every person who stores, uses, distributes or consumes in Denver any article of tangible personal property purchased at retail, as herein defined, is exercising a taxable privilege.

* * *

166A.3-2. *Imposition of Tax*

—2(1) On and after . . . April 30, 1962, there is hereby levied and there shall be collected and paid, a tax by every person exercising the taxable privilege defined in Sec. 166A.3-1(1) hereof, for the privilege of storing, using, distributing or consuming in Denver any article of tangible personal property as herein defined, purchased or acquired at retail.

—2(2) The amount of the tax hereby levied is two percent of the purchase price . . .

* * *

166A.3-3. *Exemptions*. The use, storage, distribution or consumption in Denver of the following tangible personal

property is hereby specifically exempted from the tax imposed by Sec. 166A.3-2:

* * *

-3.3(10) All sales to the United States Government; to the State of Colorado, its departments or institutions, and the political subdivisions thereof, in their governmental capacities only; and all sales to the City and any department thereof.

-3.3(11) All sales to religious, charitable and eleemosynary corporations, in the conduct of their regular religious, charitable and eleemosynary functions and activities.

* * *

-3.3(16) All sales, uses and other transactions which Denver is prohibited from taxing under the Constitution and laws of the United States of America or under the Constitution of the State of Colorado.

Ordinance No. 412, Series of 1967

**BE IT ENACTED BY THE COUNCIL OF THE CITY
AND COUNTY OF DENVER:**

Section 1. That Subsection 166.11-3 of the City Sales Tax Article of the Revised Municipal Code, be and the same is hereby repealed.

Section 2. The Council finds this Ordinance is necessary for the immediate preservation of the public health and public safety, and determines that it shall take effect immediately upon its final passage and publication.

Ordinance No. 413, Series of 1967

**BE IT ENACTED BY THE COUNCIL OF THE CITY
AND COUNTY OF DENVER:**

Section 1. That Subsection 166A.3-3(16) of the City Use Tax Article of the Revised Municipal Code, be and the same is hereby repealed.

Section 2. The Council finds this Ordinance is necessary for the immediate preservation of the public health and public safety, and determines that it shall take effect immediately upon its final passage and publication.

Regulation of Manager of Revenue

Denver Sales, Use and Lodger Tax

Auditors Guide (1966)

Guide V — Exemptions

o. Banks. Sales to National Banks, State Banks and Federal Land Banks are exempt when purchases are used in their banking business. Banking business is defined as being the normal operation of savings and commercial bank departments. A bank which operates any other business in addition to its banking facilities would not enjoy the immunity from taxation on purchases consumed in the maintenance and operation of that part of the business which is not necessary to the proper function of the bank. The purchase of computers, business machines, etc., which are used in the keeping of customer's records which are not ordinary banking transactions will be deemed to be purchased for non-banking business and as such are subject to the tax. Banks are required to collect and remit sales tax on all sales of personalized checks and upon the sale of repossessed property or other property sold by the bank. (166.11-3, 166A.3-3(16) . . .).

Order of Manager of Revenue

I, Charles L. Temple, Manager of Revenue of the City and County of Denver, State of Colorado, pursuant to Section 166.60 of the City Retail Sales Tax Article, pursuant to Section 166A.11 of the City Use Tax Article, pursuant to Section 166B.13 of the City Lodger's Tax Article, and pursuant to Article 123, all of the Revised Municipal Code of the City and County of Denver, State of Colorado, hereby repeal, effective on and after 11:59 P.M. on December 31, 1967, any and all bulletins, letters and instructions heretofore issued by the Manager of Revenue under the authority of said City Retail Sales Tax, City Use Tax and City Lodger's Tax Articles of the Revised Municipal Code of the City and County of Denver, State of Colorado, exempting national and state banks, industrial banks, Morris Plan companies, trust companies or finance companies from the incidence of the several taxes levied and assessed under said Articles 166, 166A and 166B of the Revised Municipal Code of the City and County of Denver, State of Colorado, and especially the exemptions to National and State Banks set forth in subsection (p) of Section 7 of the Exemptions set forth in the Rules and Regulations to the Denver Retail Sales Tax issued by the Manager of Revenue under date of January 1, 1952, and also the exemptions to National Banks and State Banks set forth in subsection "o" of Section "V" of the exemptions set forth in the current edition of the Auditor's Guide presently in force and effect; and by virtue of the foregoing do repeal, cancel and annul, effective on and after 11:59 P.M. on December 31, 1967, all exemptions heretofore, at any time, and in any form, granted to said National and State Banks, Industrial Banks, Morris Plan companies, trust or finance companies, from the incidence of the several taxes levied

and assessed under said Articles 166, 166A and 166B of
the Revised Municipal Code of the City and County of
Denver, State of Colorado.

Issued at Denver, Colorado, this 21st day of November,
1967.

/S/ CHARLES L. TEMPLE
Charles L. Temple
Manager of Revenue
City and County of Denver

APPROVED FOR LEGALITY:

/S/ MAX P. ZALL
Max P. Zall
City Attorney
City and County of Denver

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Liberty National Bank & Trust Co. v. Buscaglia, — N.Y. 2d—, —N.E. 2d —(Docket No. 203, Ct. of App., December 27, 1967)	35n.
Maricopa County v. Valley National Bank of Phoenix, 318 U.S. 357	11, 27, 35n.
M'Culloch v. Maryland, 4 Wheat. 316	13, 15, 23, 25
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National Bank of Detroit v. Revenue Dept., 340 Mich. 573, 66 N.E. 2d 237, app. dism. per curiam, 349 U.S. 934	50
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Oklahoma Tax Commission v. United States, 319 U.S. 598	21n.
O'Neil v. Valley National Bank of Phoenix, 58 Ariz. 539, 121 P. 2d 646	11n.
Owensboro National Bank v. Owensboro, 173 U.S. 664	11, 24, 26
Railroad Company v. Peniston, 18 Wall. 5	40n.
Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69	44
Society for Savings v. Bowers, 349 U.S. 143	42
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Toolson v. New York Yankees, Inc., 346 U.S. 356	30
United States v. City of Detroit, 355 U.S. 466	40n.
United States v. County of Allegheny, 322 U.S. 174	44
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United States v. South Buffalo Railway Co., 333 U.S. 771	30
United States v. Township of Muskegon, 355 U.S. 484	40n.
United States Trust Co. v. Helvering, 307 U.S. 57	21n.
Wisconsin v. J. C. Penney Co., 311 U.S. 435	43

STATUTES, ETC.

Act of February 25, 1863, c. 58, 12 Stat. 665	12n.
Act of June 3, 1864, c. 106, § 41, 13 Stat. 111	12n.
Act of February 10, 1868, c. 7, 15 Stat. 34	12n.
Act of March 4, 1923, c. 267, 42 Stat. 1499	13n., 32n.
Act of March 25, 1926, c. 88, 44 Stat. 223	13n., 32n.
Act of August 14, 1935, c. 531, Title IX, § 906, 49 Stat. 642	19n.
Act of September 13, 1960, Pub. L. No. 86-778, Title V, § 531(a), 74 Stat. 983	19n.
Internal Revenue Code, 1939, § 1606(b), (c)	19n.
Internal Revenue Code, 1954, § 3305(b)(c)	19
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12 U.S.C. § 21 et seq.	4, 35, 36n.
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12 U.S.C. § 30	36n.
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12 U.S.C. § 371	37
12 U.S.C. § 481	36n.
12 U.S.C. § 548	2 et seq.

12 U.S.C. §§ 601 et seq.	37
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12 U.S.C. § 627	20
12 U.S.C. § 1257(2)	2
12 U.S.C. § 1433	20n.
12 U.S.C. § 1464(h)	20
12 U.S.C. § 1768	20n.
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Mass. General Laws, c. 30A, § 7	4
Mass. General Laws	
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c. 64I	3n.
Mass. General Laws, c. 231A	4, 5 ^b
Revised Statutes, § 5219	12n.
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St. 1967, c. 757	3n., 46
12 C.F.R. part 2 <i>et seq.</i>	36n.

MISCELLANEOUS.

American Banker, p. 16	39n.
American Bankers Association, The Commercial Banking Industry, 85-90 (1962)	38n.
Comptroller's Manual for National Banks (1966)	36n.
Cong. Globe, 38th Cong., 1st Sess., 1256, 1392-1393, 1893-1899 (1864)	13, 14, 15, 16, 17

TABLE OF AUTHORITIES CITED

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64 Cong. Rec. 1454	33n.
Federal Reserve System, The; Purposes and Functions, 63 (1963), published by the Board of Governors of the Federal Reserve System	38n.
Hearings on S. 2547 Before the Subcomm. on Federal Reserve Matters of the Senate Committee on Banking and Currency, 81st Cong., 1st Sess., 9	21
H.R. Rep. No. 526, 69th Cong., 1st Sess. (1926)	32n.
H.R. Rep. No. 728, 76th Cong., 1st Sess., 71 (1939)	20
S. 2547, 81st Cong., 1st Sess. (1950)	21
S. Rep. No. 734, 76th Cong., 1st Sess., 83 (1939)	20

Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 755.

FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

BRIEF OF APPELLANT.

Opinion Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts is reported at 1967 Mass. Adv. Sh. 1301, and 229 N.E. 2d 245 (1967). It is set forth at pages 31 to 58 of the Appendix.

Jurisdiction.

On July 27, 1967, the Supreme Judicial Court for the Commonwealth of Massachusetts entered a judgment (Re-

script) which concluded that the taxes imposed by the Massachusetts Sales and Use Tax Statute (St. 1966, c. 14, § 1 and § 2), as applied to the appellant, a national bank, are not repugnant to the Constitution and laws of the United States, and decreed that Emergency Regulation No. 6, which was issued by the appellee, is valid insofar as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts Sales and Use Taxes. A final decree pursuant to the rescript was entered on August 9, 1967. This appeal was taken from the judgment of the Supreme Judicial Court and from the final decree entered pursuant thereto.¹

Since the validity of a state statute on the ground of its being repugnant to the Constitution or laws of the United States is drawn in question and the decision below is in favor of its validity, the jurisdiction of this Court is invoked pursuant to 12 U.S.C. § 1257(2) (1964). This appeal was docketed and a jurisdictional statement filed within ninety days of the date of rescript in accordance with 12 U.S.C. § 2101(c) (1964), and Supreme Court Rule No. 13.

Statutes Involved.

The federal and Massachusetts statutes directly involved are, respectively, 12 U.S.C. § 548 (1964), and St. 1966, c. 14, § 1 and § 2, as amended by St. 1966, c. 483 (see p. 55,

¹ The Supreme Judicial Court for the Commonwealth of Massachusetts is not a court of record. The record in this case is in the Supreme Judicial Court for Suffolk County. Although the rescript of the Supreme Judicial Court for the Commonwealth of Massachusetts is final for purposes of appeal to this Court (*Cole v. Violette*, 319 U.S. 581), it is the Massachusetts practice to enter a further final decree upon the rescript. To avoid any question, this appeal was taken from both the rescript and the final decree.

infra, and p. 57, *infra*).² Also involved is Emergency Regulation No. 6, issued by the State Tax Commission, appellee (see p. 74, *infra*).

Questions Presented.

The ultimate question presented is whether the Massachusetts Sales and Use Tax Statute, St. 1966, c. 14, §§ 1, 2 (and similarly Emergency Regulation No. 6), is invalid when applied to purchases by the appellant, a national bank, because the application of these Massachusetts statutory provisions (and this Regulation) to such sales and uses is repugnant to the Constitution and laws of the United States.

This ultimate question involves, among others, the following subsidiary questions:

1. Does 12 U.S.C. § 548 (1964), prohibit the application of St. 1966, c. 14, § 1 (Sales Tax Statute), and St. 1966, c. 14, § 2 (Use Tax Statute), to purchases by a national bank?
2. Does the Constitution of the United States prohibit the application of St. 1966, c. 14, § 1 (Sales Tax Statute), and St. 1966, c. 14, § 2 (Use Tax Statute), to purchases by a national bank because a national bank is an instrumentality of the United States immune from all state taxation except such as has been specifically permitted by Congress?
3. For the purpose of determining whether a national bank is immune from the Massachusetts Sales Tax, is the legal incidence of the Sales Tax with respect to purchases made by a national bank on the bank as a vendee?

² Under the provisions of this statute, both taxes were due to expire on December 31, 1967. However, on November 29, 1967, the Sales and Use Taxes were made permanent (with no changes relevant to this appeal) as chapter 64H and chapter 64I, respectively, of the Massachusetts General Laws. See St. 1967, c. 757.

Statement of the Case.

1. *Material Facts.* The appellant, First Agricultural National Bank of Berkshire County, is a national bank organized under 12 U.S.C. § 21 *et seq.*, with its principal place of business in Pittsfield, County of Berkshire, Massachusetts (A. 17-18). It is one of ninety national banks within the Commonwealth of Massachusetts (A. 19). The appellee is the State Tax Commission of the Commonwealth of Massachusetts (A. 61, 62).

Since April 1, 1966, the appellant has paid Massachusetts Sales and Use Taxes on purchases for its own use of tangible personal property (A. 18).

On March 28, 1966, the appellant, by its counsel, requested a ruling or emergency regulation that national banks are exempt from Massachusetts Sales and Use Taxes (A. 18). No ruling was received by the appellant or its counsel pursuant to such request. On May 31, 1966, however, the State Tax Commission issued Emergency Regulation No. 6, which ruled that "The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax" (A. 18).

2. *Proceedings Below.* A bill for declaratory relief under chapter 30A, § 7, and chapter 231A of the General Laws of Massachusetts was filed on August 2, 1966, with the Justice of the Supreme Judicial Court for the County of Suffolk (A. 2-15). This bill was filed by the appellant against the State Tax Commission (A. 2). In substance the bill sought a declaration that the recently enacted Massachusetts Sales and Use Taxes could not be applied to purchases made by a national bank (A. 7-8).

More particularly, the appellant prayed, *inter alia*, for a binding declaration under chapter 231A of the General Laws that sales to the appellant are exempt from the tax imposed

by St. 1966, c. 14, § 1, because the Commonwealth of Massachusetts is prohibited from taxing such sales under the Constitution or laws of the United States (A. 7). The bill also sought a binding declaration under chapter 231A of the General Laws that the storage, use or other consumption of tangible personal property by the appellant is exempt from the tax imposed by St. 1966, c. 14, § 2, because the Commonwealth of Massachusetts is prohibited from taxing such storage, use or other consumption under the Constitution or laws of the United States (A. 7). In addition, the bill sought judicial review of Emergency Regulation No. 6 issued by the State Tax Commission (A. 8).

The appellee filed an answer which admitted all the allegations of fact pleaded in the appellant's bill (A. 16). The bill and the answer raised the federal questions which are the subject matter of this appeal (A. 2-17). The parties agreed to a statement of all the material facts constituting a case stated (A. 17-29).

On August 24, 1966, by order of Paul C. Reardon, Justice of the Supreme Judicial Court, this case, at the request of counsel for both parties, was reserved and reported without decision to the Supreme Judicial Court for the Commonwealth of Massachusetts for its determination and judgment or order, upon, among other things, the bill, the answer and the agreed statement of facts constituting a case stated (A. 30).

The Full Court of the Supreme Judicial Court entered a rescript on July 27, 1967, which ordered that a final decree be entered in accordance with the Court's opinion (A. 59). The opinion passed on all the federal questions raised in this appeal (A. 31-58).

3. *Appeal.* Appeal was taken, and on January 15, 1968, this Court noted probable jurisdiction. This case was placed on the summary calendar (A. 63).

Summary of Argument.

The congressional accommodation between the power of the several states to tax on the one hand and the affairs of the Nation on the other is contained in 12 U.S.C. § 548. Congress in this statute has authorized state taxation of national banks in only one of four specified methods (in addition to taxes on their real estate). Neither the Massachusetts Sales Tax nor the Massachusetts Use Tax is one of the four methods of state taxation so authorized.

This Court has repeatedly and consistently held that the respective states are wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets or franchises, except as set forth by Congress. Despite the uncontested and overwhelming authority of these decisions, the Court below decided that the several states are completely free to employ any other methods of taxation of national banks even though these other methods are not set forth in section 548. This violates the clear legislative intent of Congress.

The legislative history of section 548 establishes that Congress intended to define the outer limit of state taxation of national banks when it enacted the original predecessor to section 548 and subsequent amendments thereto. The congressional basis for working out the scope of state taxation was legislative and not constitutional in nature. That Congress intended to prohibit state taxation of national banks (other than as expressly permitted) is confirmed by the congressional rejection of proposed amendments which would have expressly permitted much broader state and local taxation of national banks. This intent is also confirmed by subsequent congressional amendments, legislation in 1935 subjecting national banks to state unemployment taxation, and the failure to enact a Senate bill

which was filed in 1950 and which would have expressly permitted the levying of state sales and use taxes on national banks.

The opinion below is, in effect, an attempt to resurrect and judicially enact that 1950 Senate bill. In so attempting, the Massachusetts Court invoked the judicial canon that tax immunity must be expressly conferred. All the cases relied on by the Court below, however, involved statutes which conferred a limited immunity; and hence the question in those cases was whether that immunity could be judicially extended by implication. In sharp contrast is the issue on this appeal—whether, by permitting certain methods of state taxation, Congress intended to prohibit other methods. Since the congressional intent is clear with respect to 12 U.S.C. § 548, resort by the Court below to that judicial canon of construction was inappropriate in the first place. In any event, that canon should have no application where the decisions of this Court had firmly established a doctrine of constitutional immunity from state taxation which makes any express congressional prohibition superfluous.

Moreover, the conclusion reached by the Massachusetts Court is more than anomalous. Although section 548 places fairly elaborate and complex restrictions on the taxation of national-bank shares, dividends derived therefrom, and taxes on or measured by national-bank income, no longer (according to the Court below) would this congressional legislation restrict in any manner whatsoever other methods of state taxation. The opinion below thus disfigures the workable congressional accommodation contained in section 548, between the concerns of the Nation and the power of the several states to tax.

The prior decisions of this Court which have established the immunity of national banks from state taxation, except

as permitted by Congress, control the disposition of this case. They are sound law and have become "embedded" in section 548. These decisions are part of the "arch" on which the entire structure of national-bank taxation rests. Statutory interpretation, moreover, should not be altered after long standing congressional acceptance of these prior decisions. The parallel judicial and legislative activity with respect to 12 U.S.C. § 548, plainly establishes congressional reliance on these judicial pronouncements. For this reason, these decisions have become an integral part of section 548, and therefore should remain unmarred.

As federal instrumentalities, national banks (in the absence of congressional consent) are immune from state taxation. In deciding to the contrary, the Court below, in effect, ignored the decisions of this Court and the courts of sister states which have been handed down since 1913 (the year that the Federal Reserve Act was adopted), and hence after the alleged metamorphosis of national banks upon which the Court below primarily relies. The decision below also disregards the fact that national banks still retain their character as federal instrumentalities. They are creatures of the Federal Government and are chartered under the National Bank Act, which established a national banking system. As the *sine qua non* of the national banking system, national banks are the core of the federal banking structure. In addition to their membership in the national banking system, national banks are also the keystone of the Federal Reserve System. They are the only financial institutions of any kind which are *required* to be members of the Federal Reserve System. As *required* members of the Federal Reserve System, national banks are the indispensable vehicles for effecting national fiscal policy.

Both the Massachusetts Sales and Use Taxes are levied on national banks as purchasers. The use tax is not even

arguably on anyone other than the purchaser. The question of whether the Massachusetts Sales Tax is also a tax upon the purchaser is a federal one which should be decided by this Court. The rights of the appellant under 12 U.S.C. § 548, rest upon the characterization of the Massachusetts Sales Tax as a vendor or vendee tax. That such a tax is a vendee tax is clearly established by the decisions of this Court and the courts of the several states. These authorities hold that, where a sales tax is *required to be added* to the sales price and *collected* from a purchaser, the legal incidence of that tax is on the purchaser. This is precisely the nature of the Massachusetts Sales Tax. There is, moreover, a penalty for a vendor's failure to so add and collect the tax. The tax, furthermore, must be stated and charged separately from the sales price. In addition, vendors cannot advertise that they will absorb or assume it.

For these reasons, the decision of the Court below should be reversed and the imposition of both the Massachusetts Sales and Use Taxes on purchases by national banks should be declared repugnant to the laws and the Constitution of the United States.

Argument.

I. CONGRESS, BY THE PROVISIONS OF 12 U.S.C. § 548, HAS PROHIBITED THE IMPOSITION OF THE MASSACHUSETTS SALES AND USE TAXES ON PURCHASES BY A NATIONAL BANK.

Basic to the nature of our federalism is the necessity of accommodating the concerns of the Nation and those of the several states. Congress, in furthering the legitimate ends of the Federal Government, established a nationwide system of banks. At the same time, Congress chose to permit the continued existence of state banking systems. Having due regard for the importance, national character and

purposes of the national banking system, however, Congress for over one hundred years has carefully defined and redefined the manner and extent to which the states are permitted to tax national banks. The statutory provision which reflects this congressional accommodation of the power of the several states to tax on the one hand, and the affairs of the Nation on the other, is 12 U.S.C. § 548.

Congress in this statute has authorized state taxation of national banks in only one of four specified methods (in addition to taxes on their real estate). Neither the Massachusetts Sales Tax nor the Massachusetts Use Tax is one of the four methods of state taxation so authorized.³ The Massachusetts Sales and Use Taxes are not taxes levied on shares (or dividends therefrom) of a national bank; nor are they taxes on the net income (or according to the net income) of such a bank. Accordingly, the application of the Massachusetts Sales and Use Taxes to purchases by a national bank is prohibited by 12 U.S.C. § 548.

The decision below, however, held that a state can tax a national bank notwithstanding this congressional prohibition. This is in direct conflict with the decisions of this Court, which has repeatedly and consistently held that the

³ The question of whether the Massachusetts Sales Tax can be applied to purchases by a national bank involves the subsidiary question of whether the legal incidence of the sales tax is on the seller or the purchaser. The decision below held that the legal incidence of said tax was on the seller. The appellant, at pages 41 to 53 of this brief, contends that this is a federal question which was erroneously decided. For this reason, in discussing the tax-immune status of national banks, reference is made to both the Massachusetts Sales and Use Taxes. Even if this Court decides (as appellant submits it should not) that the legal incidence of the Massachusetts Sales Tax is on the seller, a decision on the issues relating to the tax-immune status of national banks as purchasers is still necessary to the disposition of this appeal. This is so because the incidence of the Massachusetts Use Tax is not even arguably on anyone but the purchaser.

respective states are wholly without power to levy any tax, either direct or indirect, upon national banks, their property, assets or franchises, except as set forth by Congress. *Owensboro National Bank v. Owensboro*, 173 U.S. 664, 668 (1889). *Bank of California v. Richardson*, 248 U.S. 476 (1919). *Des Moines National Bank v. Fairweather*, 263 U.S. 103, 106 (1923). *First National Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 347 (1926). *First National Bank of Hartford, Wisconsin v. Hartford*, 273 U.S. 548, 550 (1927). *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931). *Maricopa County v. Valley National Bank of Phoenix*, 318 U.S. 357 (1943). See *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41 (1940).⁴

In *Michigan National Bank v. Michigan*, 365 U.S. 467, 472 (1961), the majority opinion noted that this Court had passed on section 548, and its predecessors, over fifty-five times in the near century of the section's existence. Both the opinion of this Court and the dissent by Whittaker, J., joined by Douglas, J., confirm that the sole authorization under which a state is permitted to tax a national bank is section 548.

Despite the uncontested and overwhelming authority of these decisions, the Court below decided that the several states are completely free to employ any other methods of taxation of national banks -(except perhaps for discriminatory taxation) even though these other methods are not

⁴ This well-established and (until the decision below) uncontested proposition has been unqualifiedly recognized by numerous state Court decisions. *First National Bank of Birmingham v. State*, 262 Ala. 155, 77 So. 2d 653 (1954). *O'Neil v. Valley National Bank of Phoenix*, 58 Ariz. 539, 121 P. 2d 646 (1942). *First National Bank & Trust Co. v. West Haven*, 135 Conn. 191, 62 A. 2d 671 (1948). *First National Bank of Portland v. Marion County*, 169 Ore. 595, 130 P. 2d 9 (1942). *Northwestern National Bank of Sioux Falls v. Gillis*,—S.D.—, 148 N.W. 2d 293 (1967). *Austin v. Seattle*, 176 Wash. 654, 30 P. 2d 646 (1934).

set forth in section 548. This is not only squarely contrary to the teachings of this Court, but also violates the clear legislative intent of Congress. That intent distinctly emerges from the legislative history of section 548.

In 1863 Congress established the national banking system. One year later the original predecessor to section 548 was passed, along with other amendments designed to correct defects in the 1863 legislation.⁵

⁵ The 1863 Currency Act contained no provision for State taxation of national banks or their shares. Act of February 25, 1863, c. 58, 12 Stat. 665. The relevant portion, section 41, of the 1864 legislation reads as follows:

"In lieu of all existing taxes, every [national bank] shall pay to the Treasurer of the United States, in the months of January and July, a duty . . . : *Provided*, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body-corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State: *Provided further*, That the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located: *Provided, also*, That nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed." Act of June 3, 1864, c. 106, § 41, 13 Stat. 111.

A technical amendment was made to the statute in 1868, Act of February 10, 1868, c. 7, 15 Stat. 34. Congress in 1878 redesignated the section as section 5219 of the Revised Statutes. In response to the decision of this Court in *Merchants' National Bank of Richmond, Virginia v. Richmond*, 256 U.S. 635 (1921), an amendment was passed to clarify the standard of "competing capital" which that case brought into focus. The 1923 amendment

During the debates on these amendments and in response to a concern expressed by Senator Sumner with respect to the state taxation of national banks (the 1863 legislation contained no such provision), Senator Fessenden, Chairman of the Finance Committee, emphasized that the bill would limit as well as permit state taxation.

"If the Senator reads this bill he will perceive that all of the power of taxation upon the operations of the bank itself, all upon the circulation, all upon the deposits, all upon everything which can properly be made by a tax is reserved to the General Government; that the States cannot touch it in any possible form; that they are limited and controlled; the simple right is given them to say that the property which their own citizens have invested in it shall contribute to State taxation precisely as other property.⁶

Congress, of course, was well aware of the decision in *M'Culloch v. Maryland*, 4 Wheat. 316 (1819). The congressional debates are replete with references to it.⁷ With Chief Justice Marshall's opinion looming in the background, Congress realized that it was determining the outer limit of state taxation of national banks.

Congress also was conscious of the fact that this determination was legislative and not constitutional in nature. Congressional policy—not constitutional doctrine—was the

also permitted states to tax national-bank dividends and income. Act of March 4, 1923, c. 267, 42 Stat. 1499. Section 548 was amended for the last time in 1926 to permit states to levy franchise and excise taxes on national banks measured by the entire income (including income from tax-exempt securities) of the banks. Act of March 25, 1926, c. 88, 44 Stat. 223.

⁶ Cong. Globe, 38th Cong., 1st Sess., 1895 (1864).

⁷ See, e.g., *id.*, pp. 1893-1899.

basis for working out the scope of state taxation. This was made clear by Senator Sumner:

"If you allow the State to interfere with the proposed system by taxation in any way, may they not embarrass it? Where shall they stop? Where will you run a line? Unquestionably, according to the Supreme Court, they cannot tax the bank directly. This would be unconstitutional. But it is said that they may tax the shares. Now I raise no constitutional question. It may be that a tax on shares is constitutional. But I do not propose to consider it on this ground. I am now arguing against the policy of allowing any such tax. It is a question of expediency which I raise, for the sake of the system we are about to establish. But here the rule seems clear. Every consideration which can be urged against taxing the bank directly may be urged against taxing the shares. If it be bad policy in one case, it must be bad policy in the other."⁸

This view was confirmed by one of his leading adversaries, Senator Fessenden:

"The question there [in *M'Culloch v. Maryland*] was whether a State could impose a tax upon the operations of an instrumentality made by this Government for its own purposes. That is the first distinction between the cases. There is another distinction. Here we propose, we who pass the act, the authority of the Government which makes the instrumentality, propose to say that to a certain exercise of power on the part of the States we assent; and therefore all the argument adduced from this decision had not the slightest applicability in the world. But when we come to the question of

⁸ *Id.*, p. 1893.

expediency, the question of *propriety*, the question of *what is wise* in reference to this matter, the honorable Senator and myself may differ, and we do differ.”⁹
 4.(Emphasis supplied.)

In making this policy decision, *M'Culloch v. Maryland* served as a reminder that state regulation and state taxation posed a potential threat to the national banking system. For example, this case was cited by Senator Sumner in urging that national banks should be completely immune from such taxation:

“It was there insisted that the tax was unconstitutional. But the words of the Chief Justice seem almost intended for the present occasion.

“Now, sir, every consideration, every argument which goes to sustain this great judgment may be employed against the proposed concession to the States of the power to tax this national institution in any par-

⁹ *Id.*, p. 1895. The same view was also expressed by Senator Colamer:

“That is a mere question of policy; of expediency. It is not a question of constitutional law particularly. I never stated that it was. The honorable Senator from Massachusetts read a great deal from the opinion of Chief Justice Marshall in McCulloch's case. What on earth has that to do with this question? That was a case where the General Government made a bank and the State of Maryland undertook to tax the operations of that bank in that State. The court decided that the State could not do it. The question before us now is, will we agree in Congress to say that the State may have the power of taxation to a certain extent? Is there anything unconstitutional in that? Has that anything to do with the McCulloch case? Nothing in the world, as a question of expediency, not that a decision of a constitutional right and wrong has nothing to do with it.” *Id.* p. 1899.

ticular, whether directly or indirectly. The reason of the judgment is as strong against an indirect tax as against a direct tax." ¹⁰

Congress also had concerns other than protecting national banks from the potentially destructive forces of state taxation. One purpose of the 1864 amendments was to induce state banks to convert into national banks.¹¹ Congress realized that the degree of protection it afforded national banks from state, municipal and local taxation would affect the willingness and rapidity with which state banks would so convert.¹² This objective, of course, was purely legis-

¹⁰ *Id.* at 1893-1894.

¹¹ In the debates, Congressman Hooper stated:

"It should be borne in mind that this is not a bill to establish the system of national banks; its only purpose is to amend the act which established that system, to correct what the experience and observation of the past year have shown to be imperfect, and *to render the law so perfect that the State banks may be induced to organize under it, in preference to continuing under their state charters.*" (Emphasis supplied.)

Id. at 1256.

¹² This observation was made in both Senate and House debates.

"I never questioned the right and power of the Government to levy this tax, or any other tax, upon these banks; and I do not now question that power. Nor do I question the power of Congress to turn these banks over to State, town, city, and municipal taxation. The position which I took was, that in case this was done it would destroy the bill; that no bank could or would be organized under the bill after the adoption of that amendment." *Id.* at 1891 (remarks of Senator Chandler).

"This bill holds out inducements to others to invest their means in bank stock so that they may avoid their portion of the State taxation which should justly fall on every individual in the State according to the value of his personal property. I know no reason why the amendment should prevail." Cong. Globe, 38th Cong., 1st Sess., 1393 (1864) (remarks of Congressman J. C. Allen).

lative in character and wholly without constitutional dimension.

The proceedings of both the House and the Senate indicate that there was a polarization of views around those favoring full nondiscriminatory state taxation of national banks and those favoring a complete exemption of national banks from such taxation. The resulting statute was a compromise designed to permit certain forms of state taxation and to prohibit others. This congressional accommodation provided the several states with a source of revenue while at the same time furthering the development of the national-banking system and its protection.

In reaching this compromise, proposed amendments expressly permitting much broader state and local taxation of national banks were introduced, debated and rejected by the Congress. Among these was an amendment introduced in the House which would have made national banks subject, without exception, to all state and local general taxes on personal as well as real property.

"And the said associations or corporations shall severally be subject to State and municipal taxation upon their real and personal estate, the same as persons residing at their respective places of business are subject to such taxation by State laws."¹³

The rejection of these broader, more permissive measures demonstrates a clear congressional intent to prohibit all state, municipal and local taxation of national banks except as specifically set forth in the statute. With this prohibition in mind, Congress passed an amendment in 1923 in order to permit the several states to tax the income of national banks—a method of taxation which was becoming an in-

¹³ *Id.*, p. 1392. For another more permissive tax proposal which was also rejected, see the discussion relating to an amendment to H.R. 333, *Id.*, p. 1452.

creasingly important source of revenue for the states. In 1926, Congress broadened the authority of the several states to tax national banks for the last time. This amendment permitted the states to levy franchise and excise taxes on national banks measured by the income of the banks.¹⁴

The prohibitive, as well as the limited-permissive, character of section 548 (apparent from the legislative history of this section) has been recognized by this Court. In *Bank of California v. Richardson*, 248 U.S. 476 (1919), it was noted that the predecessor to section 548, which is in no way materially different from section 548 as presently in force for the purposes herein cited, was intended to control comprehensively the subject with which it dealt and thus to furnish the exclusive rule governing state taxation of national banks.

"There is also no doubt from the section that it was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in the section. All possibility of dispute to the contrary is foreclosed by the decisions of this court." 248 U.S. at 483.

This Court further noted that two provisions in apparent conflict were adopted by the Congress: first, the absolute exclusion of power in the states to tax national banks (in order to prevent any state interference with their operations, the integrity of their assets or the administrative governmental control over their affairs); second, preservation of the taxing power of the several states so that the financial resources engaged in the development of national banks might not be wholly withdrawn from the reach of state taxation. The first aim was accomplished by the non-

¹⁴ See page 12, n. 5.

recognition of any power in the states to tax national banks except as to real estate. The second was reached by permitting taxation of the stockholders of national banks.

"Full and express power on that subject [taxation of national bank stockholders] was given, accompanied with a limitation preventing its exercise in a discriminatory manner, a power which again from its very limitation was exclusive of other methods of taxation and left, therefore, no room for taxation of the federal agency or its instrumentalities or essential accessories, except as recognized by the provision in question."

248 U.S. at 483, 484.

This understanding of section 548 and the congressional policy it embodies was vividly underscored by the passage of section 3305(b) of the Internal Revenue Code.¹⁵ This provision was enacted in order to subject national banks to state unemployment taxes. Such action was obviously necessary from Congress's point of view, because section 548 prohibited such taxation in the absence of express congressional permission. Its passage confirmed the long-standing intent of Congress to permit state taxation of national banks in only certain specified ways. In enacting this provision, the House Ways and Means Committee Report

¹⁵ § 3305(b) of the 1954 Internal Revenue Code was originally enacted in 1935. Act of August 14, 1935, c. 531, Title IX, § 906, 49 Stat. 642. It was incorporated into the 1939 Internal Revenue Code as § 1606(b). A 1960 amendment modified some of the language referring to certain federal instrumentalities, but without any change in wording or substance as far as national banks were concerned. Act of September 13, 1960, Pub. L. No. 86-778, Title V, § 531(a), 74 Stat. 983. A companion provision in both the 1939 code and the 1954 code, § 1606(c) and § 3305(c) respectively, granted the states, *inter alia*, the right to require unemployment-tax returns from national banks.

had this to say about national banks as federal instrumentalities:

"Subsection (b) confers on State legislatures authority to require instrumentalities of the United States . . . to comply with State unemployment compensation laws. Under this amendment the States would be able to cover under their unemployment compensation systems national banks and certain other Federal instrumentalities . . ." H.R. Rep. No. 728, 76th Cong., 1st Sess., 71 (1939).

A similar statement appeared in the Senate Finance Committee report on the bill. S. Rep. No. 734, 76th Cong., 1st Sess., 83 (1939).

In contrast to granting the several states a specific and carefully limited authority to tax (such as the authority to levy unemployment taxes on national banks), Congress on appropriate occasions has given the states a broad and general authority. For example, Federal Savings and Loan Associations are subject to all nondiscriminatory state, municipal and local taxation. 12 U.S.C. § 1464(h) (1964). This is also true of so-called Edge Act corporations, which are established to engage in international and foreign banking. 12 U.S.C. § 627 (1964).¹⁶

It is clear that, unlike the taxation of Federal Savings and Loan Associations and Edge Act corporations, Congress never intended to subject national banks to extensive or unlimited state taxation. In fact, in 1950 a bill was

¹⁶ In modern times Congress has also created federal financial institutions which have been given an express and unqualified exemption from state taxation. See, e.g., 12 U.S.C. § 1433 (1964), and 12 U.S.C. § 1768 (1964), relating to Federal Home Loan Banks and Federal Credit Unions respectively. These statutes are of recent vintage, unlike section 548, which traces its origin back to another era and which contains somewhat archaic language.

sent to the Subcommittee on Banking and Currency which would have granted the states broad authority to tax national banks. S. 2547, 81st Cong., 1st Sess. (1950). None of the provisions of this bill were ever enacted. The bill, *inter alia*, expressly authorized states to levy sales and use taxes (such as the Massachusetts Sales and Use Taxes) on national banks. S. 2547 stated in part: ". . . A State or any subdivision thereof may also subject associations [national banks] to taxes and license fees upon the purchase, sale, or use of tangible personal property and public utility services." The members of the subcommittee fully realized that, without such legislation, national banks would not be subject to sales and use taxes. *Hearings on S. 2547 Before the Subcomm. on Federal Reserve Matters of the Senate Committee on Banking and Currency*, 81st Cong., 1st Sess., 9 (1950). This 1950 proposed legislation never became law.

The opinion below is, in effect, an attempt to resurrect and judicially enact that 1950 Senate bill. In so doing, the Massachusetts Court relied on cases which were read as standing for the broad proposition that tax immunity must be expressly conferred.¹⁷ Those decisions, however, are wholly inapposite. They did not involve in any way a federal statute which authorized state taxation. Where a statute was involved in those decisions, it was a statute which conferred a limited immunity, and, hence, the issue was whether that immunity could be judicially extended by

¹⁷ *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939). *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1939). *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 606 (1943). *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 366 (1949). The Court also remarked that section 548 ". . . only purports to regulate taxation of national bank shares . . ." (A. 56.) This is not true. Section 548 expressly provides that "The several States may . . . tax such associations [national banks] on their net income, or . . . according to or measured by their net income. . . ."

implication. That issue is a far different matter from that presented by section 548. Here, the issue is whether, by permitting certain forms of state taxation, Congress intended to prohibit other such forms. As previously demonstrated, Congress clearly intended such prohibition. Resort by the Court below to the canon of construction that tax immunity must be expressly conferred was therefore inappropriate in the first place. In any event, the canon clearly should have no application in a situation (such as that presented by section 548) where the decisions of this Court had firmly established a doctrine of constitutional immunity from state taxation at the time or times Congress passed or amended the statute in question. In short, the Court below would require of Congress that which this Court made superfluous. It is submitted that this is judicial legislation in the guise of judicial construction.

The conclusion reached by the Massachusetts Court is more than anomalous. Under the reasoning of that opinion, the several states are completely free to employ any method of taxation of national banks (except perhaps for discriminatory taxation) which they see fit. The only restrictions on the states, according to the opinion below, are those contained in section 548. This result is most perplexing. The decision below (if allowed to stand) would produce the following consequences: First, although section 548 places fairly elaborate and complex restrictions on the taxation of national bank shares, dividends derived therefrom, and taxes on or measured by national-bank income, no longer would this congressional legislation restrict in any manner whatsoever other methods of state taxation; and second, while a state may tax a national bank in only one of the methods set forth in section 548 in lieu of all the other methods so set forth, the several states could levy innumerable other types of taxes. This interpretation of

section 548, of course, directly conflicts with the decisional law and the intent of Congress.

The Court below certainly should have heeded the warning of this Court in *Federal Land Bank v. Bismarck Co.*, 314 U.S. 95, 104 (1941):

“It is not our function to speculate whether the immunity from one type of tax, as contrasted with another, is wise. That is a question solely for Congress, acting within its constitutional sphere, to determine.”

Where there has been a workable congressional accommodation between the concerns of the Nation and the power of the several states to tax, it should be adhered to. If such an accommodation unduly intrudes upon either the business of the Nation or that of the several states, it is for Congress to make the desirable adjustment.

Congress has said, and this Court has recognized, that section 548 defines the limit beyond which a state is prohibited to tax national banks. For this reason, the levying of a Massachusetts Sales and Use Tax on purchases by national banks violates this federal statute.

II. PURCHASES BY NATIONAL BANKS ARE IMMUNE FROM THE MASSACHUSETTS SALES AND USE TAXES BECAUSE CONGRESS HAS NOT PERMITTED SUCH TAXATION.

A. Decisions Establishing This Immunity may Not be Re-examined; because they have Become “Embedded” in 12 U.S.C. § 548, and have been Relied upon by Congress.

From the time of *M'Culloch v. Maryland*, 4 Wheat. 316 (1819), the fact that national banks are instrumentalities

of the Federal Government, properly created by Congress in the exercise of its constitutional power, has been well settled and (until the decision below) uncontroverted. Since Chief Justice Marshall's historic decision, this Court has repeatedly recognized and reaffirmed this principle. It would be to labor a point to cite and discuss more than a few of these cases.

In *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), two national banks claimed that state taxing officers exacted *ad valorem* taxes on their shares of stock at rates higher than were exacted from competing moneyed interests. The issue was the legal effect under the federal law of this wrongful administration of the state law. This Court held that these banks were subjected to discriminatory taxation which was forbidden by congressional legislation. In so deciding, this Court also held that a national bank was an instrumentality of the United States, and, as such, could not constitutionally be taxed by a state except as permitted by federal statute.

Owensboro National Bank v. Owensboro, 173 U.S. 664 (1889), involved an attack on the validity of a state tax based in part on the nature of the tax notwithstanding its discriminatory or nondiscriminatory nature. This Court held that the taxes imposed upon the bank and its property or franchise were void. In so holding, the Court said:

"The principles settled by the cases just referred to and subsequent decisions were thus stated by this court in *Davis v. Elmira Savings Bank*, 161 U.S. 283:

"'National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such at-

tempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court.'

"It follows then necessarily from these conclusions that the respective States would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress."

173 U.S. at 667-668.

This Court was fully cognizant that there were many differences between the Bank of the United States, which was the subject of the *M'Culloch* decision, and national banks chartered under the National Bank Act. Nevertheless, this Court emphasized that the principles set forth in that landmark opinion were equally applicable to these banks. The status of national banks chartered under the National Bank Act in our federal system was fully considered in *Easton v. Iowa*, 188 U.S. 220, 229 (1903):

"That legislation [the National Bank Act] has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States. Having due regard to the national character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated

for private gain. The principles enunciated in *M'Culloch v. Maryland*, 4 Wheat. 316, 425, and in *Osborn v. United States Bank*, 9 Wheat. 738, though expressed in respect to banks incorporated directly by acts by Congress, are yet applicable to the later and present system of national banks." 188 U.S. at 229.

That national banks are federal instrumentalities was confirmed as recently as 1963. In *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558-559 (1963), it was held that—

"National banks are federal instrumentalities and the power of Congress over them is extensive. 'National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit.' *Van Reed v. People's Nat. Bank*, 198 U.S. 554, 557."

Equally well established and deeply entrenched is the corollary principle that the several states are without authority to levy any tax, either direct or indirect, upon national banks, their property, assets or franchises, were it not for the permissive legislation (12 U.S.C. § 548) of Congress. *Owensboro National Bank v. Owensboro*, 172 U.S. 664, 668 (1889). *Talbott v. Silver Bow County*, 139 U.S. 438 (1891). *Bank of California v. Richardson*, 248 U.S. 476 (1919). *Des Moines National Bank v. Fairweather*, 263 U.S. 103, 106 (1923). *First National Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 347 (1926). *First National Bank of Hartford, Wisconsin v. Hartford*, 273 U.S. 548, 550 (1927). *Iowa-Des Moines National Bank v. Ben-*

nett, 284 U.S. 239 (1931). *Maricopa County v. Valley National Bank of Phoenix*, 318 U.S. 357 (1943). See *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41 (1940). For example, the Court held in the *Anderson* decision that—

“National banks are not merely private moneyed institutions but agencies of the United States created under its laws to promote its fiscal policies; and hence the banks, their property and their shares cannot be taxed under state authority except as Congress consents and then only in conformity with the restrictions attached to its consent.” 269 U.S. at 347.

As recently as 1961, Justice Clark, speaking for the majority in *Michigan National Bank v. Michigan*, 365 U.S. 467, 472 (1961), observed that this Court had passed on 12 U.S.C. § 548, and its predecessors over fifty-five times in the near century of the section’s existence. Both the majority and the dissenting opinions expressly recognized that the sole authorization under which a state is permitted to tax a national bank is 12 U.S.C. § 548. 365 U.S. at 470, 483.

It is inconceivable that there could be any doubt concerning this matter. Only slightly more than one year ago this Court said, in a unanimous decision, that the tax-immunity of national banks as instrumentalities of the United States “is beyond dispute.” *Department of Employment v. United States*, 385 U.S. 355 (1966). This Court held that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation on its operations, and that this immunity had not been waived by congressional enactment. In so holding, this Court noted in an opinion by Justice Fortas, at page 360:

“In those respects in which the Red Cross differs from the usual government agency—e.g., in that its

⁶ employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—e.g., *national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute.*" (Emphasis supplied.)

For over a century and on at least fifty-five occasions this Court has considered 12 U.S.C. § 548, and its predecessors. These decisions have clearly, unequivocally and unremittingly established that states can directly or indirectly tax national banks only as Congress permits. The appellee now asks this Court to deface all of these prior determinations. As the appellant contends,¹⁸ these authorities, which have been soundly reasoned and decided, control the issues raised on this appeal. Before reaching this question, however, the appellee has the burden of establishing that its request for re-examination of these decisions should be granted. This request should be refused, because these decisions have become an integral part of section 548 and have been relied upon by Congress. This Court has so refused even in situations where (unlike the judicial determinations which are the focal point of this appeal) the Court has discredited its own decisions.

It is established that constitutional principles (such as those enunciated in the aforementioned decisions of this Court) become "embedded" in subsequent congressional legislation touching on the same subject matter. This doctrine has particular force where explicit reference to such decisions appears in the statute or (as is true in this case) in its legislative history. *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). *Davis v. Department of*

¹⁸ See pp. 34, 41, *infra*.

Labor, 317 U.S. 249 (1942). The doctrine has further been held to be applicable where specific references to the constitutional principles are not contained in the statute or its legislative history, but where (as is also true in this case) congressional awareness of the decisions is beyond dispute. *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 474 (1959).

This doctrine was applied in *State Board of Insurance v. Todd Shipyards*, 370 U.S. 451 (1962), which involved state regulation of insurance companies doing business in interstate commerce. Congress had provided in 15 U.S.C. §1011, that ". . . the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose *any barrier* to the regulation or *taxation* of such business *by the several States.*" (Emphasis supplied.) This Court construed the statute to permit state regulation and taxation only to the extent that such regulation and taxation were constitutionally permissible under decisions made prior to the enactment of the statute. Despite the fact that these prior decisions (unlike the judicial determinations which are the focus of this appeal) were discredited by this Court, and despite this Court's recognition of its "freedom to change our decisions on the constitutionality of law," it was held that—

"When, therefore, Congress has posited a regime of state regulation on the continuing validity of specific prior decisions . . . we should be loath to change them."

"Here Congress tailored the new regulations for the insurance business with specific reference to our prior decisions. Since these earlier decisions are part of the arch on which the new structure rests, we refrain from

disturbing them lest we change the design that Congress fashioned." 370 U.S. at 457-458.

The content, legislative history and judicial background of the federal statute involved in the *Todd Shipyards* decision are strikingly similar to that of 12 U.S.C. § 548. In both statutes Congress granted the several states power to tax. In each case this Court had enunciated constitutional limitations on the authority of the states to so tax prior to the enactment of the statutes in question. Congress was aware of and had relied on these decisions in making its legislative determination. In reliance on the respective federal statutes and the prior decisional law, the several states had erected comprehensive regimes of state taxation. As in the *Todd Shipyards* case (and the other aforementioned decisions), it is submitted that this doctrine should preclude re-examination by this Court of the vast body of decisional law dealing with the extent to which Congress has permitted state taxation of national banks. These earlier decisions "are part of the arch" on which the structure of national bank taxation rests. Disturbing these decisions will change the design which Congress has fashioned.

There is yet another, but closely related, reason why this Court should not depart from all these prior determinations. Statutory interpretations should not be altered after Congressional acceptance of long standing. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953). *United States v. South Buffalo Railway Co.*, 333 U.S. 771, 774 (1948). While congressional silence may occur in a context which renders the judicial interpretation of this silence unduly speculative, such is certainly not the case when congressional acquiescence parallels a century of noted decisions by this Court—decisions which have prohibited on constitutional grounds state taxation where federal legislation could have

permitted it. *Gwin, White & Prince Inc. v. Henneford*, 305 U.S. 434 (1939). The *Gwin* case held that a state tax measured by the taxpayer's gross receipts from sales of fruit which was shipped out of the taxing state violated the commerce clause of the Federal Constitution. In so holding, this Court stressed that Congress had seen fit not to exercise its constitutional power to alter or abolish the rules which were established by the prior judicial decisions of this Court. In fact, the Court further noted that Congress had accommodated its legislation, as had the states, to these rules as an established feature of our constitutional system.

"For more than a century, since *Brown v. Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. . . . For half a century, following the decision in *Philadelphia & Southern S.S. Co. v. Pennsylvania*, 122 U.S. 326, it has not been doubted that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it." 305 U.S. at 441.

The Court's reasoning in the *Gwin* decision is equally apposite in the instant case. The line of decisions construing section 548 as the outer limit beyond which states cannot tax national banks spans a century. During this period Congress has displayed its continuing concern with respect to such taxation. In 1923 and in 1926 substantive amendments were made which directly affected the scope of the several states' authority to tax national banks.¹⁹ More recently, Congress has subjected national banks to state unemployment taxation.²⁰ In 1950 a Senate bill would, if enacted, have expressly permitted the levying of state sales and use taxes on national banks.²¹ These congressional developments indicate a positive reliance on the decisions of this Court.

Congressional awareness of the determinations of this Court relative to the authority of the several states to tax national banks is well illustrated by the legislation which followed in the footsteps of *Merchants' National Bank of Richmond v. Richmond, Virginia*, 256 U.S. 635 (1921). This decision held that the rate of state taxation of national-bank shares could not be greater than the rate imposed on bonds, notes and other evidences of indebtedness in the hands of individuals. This interpretation did not coincide

¹⁹ The 1923 amendment, among other things, authorized the state taxation of national-bank income and dividends. Act of March 4, 1923, c. 267, 42 Stat. 1499. Congress in 1926 granted to the states the additional alternative of taxing national banks "according to or measured by their income," so that states could for the first time impose a corporate excise or franchise tax on the banks' income from all sources, including tax-exempt securities. Act of March 25, 1926, c. 88, 44 Stat. 223. For an extended discussion of the 1923 and 1926 amendments see H.R. Rep. No. 526, 69th Cong., 1st Sess. (1926).

²⁰ See p. 19, *supra*.

²¹ See pp. 20, 21, *supra*.

with Congress's view of the statute, and so the aforementioned 1923 amendment was passed.²² On that occasion Congress did not (nor on any other occasion has it ever) cast any doubt upon its construction of section 548 as defining the outer limit of state taxation of national banks. In fact, the legislative history of that amendment reaffirms this congressional construction. For example, Senator Pepper, in discussing the 1923 amendment and the *City of Richmond* decision, said:

"Mr. President, this measure is an attempt to deal with a serious difficulty which at present exists in connection with the taxation by the several States of shares in national banking associations. These bodies, being agencies of the Federal Government, may not be taxed by the States excepting in accordance with such legislation as the Congress may from time to time enact."²³

This parallel judicial and legislative activity with respect to 12 U.S.C. § 548, plainly establishes that Congress has fashioned an over-all design for accommodating the states' power to tax national banks and the affairs of the Nation. This accommodation is grounded in congressional reliance on the pronouncements of this Court. These decisions have become an integral part of section 548, and, as such, they represent the foundation upon which the entire structure of national-bank taxation rests. The long-established principle that the several states are without power to levy a tax upon national banks in the absence of permissive legislation by Congress should stand unmarred. 12 U.S.C.

²² 64 Cong. Rec. 1454 (1923) (remarks of Senator Pepper).

²³ *Ibid.*

§ 548, clearly does not authorize the levy by a state of a sales or use tax. For this reason, national banks should be protected from the levying of Massachusetts Sales and Use Taxes on purchases made by such banks.

B. National Banks are Federal Instrumentalities which are Entitled to this Immunity.

The constitutional power and responsibility of Congress with respect to banking and currency is in many respects unique. Unlike many of the Congress's other regulatory functions, banking and currency involves the federal *creation* of the necessary financial structures and instrumentalities through which the financial affairs of the Nation can be conducted. Primary and essential to the complex financial edifice which Congress has created, regulated and protected is the national banking system.

Realizing the primacy and importance of this system, this Court has without exception for over one hundred years protected national banks from state taxation except as Congress, the architect of the federal design, has expressly permitted.²⁴

Notwithstanding the clarity with which this Court has spoken for well over a century, the Court below is of the view that national banks have lost their immunity from state taxation. The decision below, in effect, ignores the decisions of this Court and the Courts of sister states which have been made since 1913, the year that the Federal Reserve Act was adopted, and hence after the alleged metamorphosis of national banks upon which the Court below primarily relies (A. 43). Of all the decisions of this Court relied on by the appellant, only two of the cases were de-

²⁴ See cases cited on pp. 26-28, *supra*. For state cases which have, without reservation, recognized the same principle see p. 11, n. 4.

cided prior to 1913. All of the state court cases cited were decided twenty or more years after the creation of the Federal Reserve System.²⁵

The decision below also disregards the fact that national banks still retain their character as federal instrumentalities. National banks are creatures of the Federal Government and owe their very existence to congressional legislation. 12 U.S.C. § 21 *et seq.* The National Bank Act, under which they are chartered, constitutes by itself a complete system for the establishment and government of national banks. *Deitrick v. Greaney*, 309 U.S. 190 (1940). This is the oldest existing instrumentality established by Congress to provide a safe, sound and effective banking system.²⁶ Membership in this system subjects national banks to the continuing detailed supervision of the Treasury Department, as the myriad of Treasury rules, regulations, required reports and examinations will attest.²⁷

²⁵ The following cases were decided after 1913: *Bank of California v. Richardson*, 248 U.S. 476 (1919). *Des Moines National Bank v. Fairweather*, 263 U.S. 103, 106 (1923). *First National Bank of Guthrie, Center v. Anderson*, 269 U.S. 341, 347 (1926). *First National Bank of Hartford, Wisconsin v. Hartford*, 273 U.S. 548, 550 (1927). *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931). *Maricopa County v. Valley National Bank of Phoenix*, 318 U.S. 357 (1943). *First National Bank & Trust Co. v. West Haven*, 135 Conn. 191, 62 A.2d 671 (1948). *First National Bank of Portland v. Marion County*, 169 Ore. 595, 130 P.2d 9 (1942). *Northwestern National Bank of Sioux Falls v. Gillis*,—S.D.—, 148 N.W.2d 293 (1967). *Austin v. Seattle*, 176 Wash. 654, 30 P.2d 646 (1934). See *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41 (1940); *Michigan National Bank v. Michigan*, 365 U.S. 467, 472 (1961). *Contra, Liberty National Bank & Trust Co. v. Buscaglia*,—N.Y. 2d—, —N.E. 2d—(Docket No. 203, Ct. of App., December 27, 1967).

²⁶ See p. 12, *supra*.

²⁷ The administration of the national banking system is under the supervision of the Comptroller of the Currency, who is the chief officer in the Bureau of the Comptroller of the Currency,

As the *sine qua non* of the national banking system, national banks are the core of the federal banking structure. They are the means through which the Federal Government can accomplish its ends without dependence on, or resort to, state banks and the governments of the several states. The

a division of the Treasury Department. See 12 U.S.C. § 1 (1964). Thus, application to form a national bank must be made to the Comptroller, who determines whether the association is lawfully entitled to commence the business of banking. 12 U.S.C. §§ 21, 26 (1964). After the bank has been organized, it may transact its business only in the place and under the name specified in the bank's organization certificate unless the Comptroller approves a change in either name or location. 12 U.S.C. § 30 (1964). Once established, a national bank is required to make periodic reports of condition to the Comptroller. In addition, the Comptroller has the authority to require special reports "... whenever in his judgment the same are necessary for his use in the performance of his supervisory duties." 12 U.S.C. § 161 (1964). The bank is also subject to examinations at least twice a year by this division of the Treasury Department. 12 U.S.C. § 481 (1964).

The magnitude of supervision over national banks exercised by the Treasury Department is evidenced by the multitude of subjects governed by regulations issued by the Comptroller of the Currency. These include such areas as procedures (12 C.F.R. part 4); assessments of fees (12 C.F.R. part 8); fiduciary power of national banks (12 C.F.R. part 9); annual reports (12 C.F.R. part 10); changes in capital structure (12 C.F.R. part 14); international operations (12 C.F.R. part 20); ownership reports by certain persons (12 C.F.R. part 12); employee stock option and stock purchase plans (12 C.F.R. part 13); loans made by national banks secured by direct obligations of the United States (12 C.F.R. part 3); national-bank loans secured or covered by governmental guarantees (12 C.F.R. part 3); national banks acting as insurance agents and as brokers or agents in making or procuring loans on real estate (12 C.F.R. part 2); solicitation of proxies (12 C.F.R. part 11).

In addition, the Comptroller has rule-making power over such varied subjects as general principles of prudent banking, lending limits, bank ownership of property, corporate practice and other miscellaneous matters, including suretyship, insurance, interest charges and usury. See Comptroller's Manual for National Banks (1966).

instances in which the Congress has so engaged the national banks are numerous. National banks have been authorized to purchase, hold, underwrite and deal in (without limitation as to amount) obligations of the United States, Federal Home Loan Banks, the Federal National Mortgage Association, the International Bank for Reconstruction and Development, the Inter-American Development Bank and the Asian Development Bank. 12 U.S.C. § 24 (Seventh) (1964). State banks may deal and invest in such securities only if they are permitted to do so under state law.

To assist the Federal Government in promoting trade and commerce and to act as fiscal agents of the United States, if so required, national banks are empowered, under 12 U.S.C. § 601 *et seq.*, to establish branches in foreign countries. Moreover, under 12 U.S.C. § 611 (1964) *et seq.*, national banks may organize Edge Act corporations to engage in international and foreign banking, or other financial operations, and to act when required by the Secretary of the Treasury as a fiscal agent of the United States.

Congress, in controlling the lending limits of national banks, directly affects the availability of credit throughout the Nation. 12 U.S.C. § 371 (1964), for example, prescribes the authority of national banks to make real-estate mortgage loans. The lending authority of state banks, on the other hand, is controlled by each of the respective several states. Through national banks, however, Congress can make national adjustments to the credit market.

In addition to their membership in the national banking system, national banks are also the keystone of the Federal Reserve System. The only banks, indeed the only financial institutions of any kind in the United States, which are *required* to be members of the Federal Reserve System are national banks. See 12 U.S.C. § 222 (1964). The function

of the Federal Reserve System is to establish and effect national fiscal and monetary policy.

"An efficient monetary mechanism is indispensable to the steady development of the nation's resources and a rising standard of living. The function of the Federal Reserve System is to foster a flow of credit and money that will facilitate orderly economic growth, a stable dollar, and long-run balance in our international payments." *The Federal Reserve System: Purposes and Functions* 1 (1963).

The national monetary policy of the Federal Reserve Bank is effected throughout the United States primarily by means of the Federal Reserve System's control over the reserve positions of national banks. It is these reserves which determine the degree to which a national bank can make loans, investments, and, in general, extend credit.²⁸ The complicated mechanics through which fiscal control is exerted over the national economy need not be discussed in great detail. Suffice it to say, as *required* members of the Federal Reserve System, national banks are the indispensable vehicles for effecting national fiscal policy.

Non-member banks (including state member banks which voluntarily leave the system) are not subject to the requirements of the Federal Reserve System. This fact was underscored by the recent action of the State of Ohio in the last week of December, 1967. During that week the Federal

²⁸ The reserve positions of national banks is determined principally through the open-market operations of the Federal Reserve System and the establishment of discount rates and reserve requirements. For a complete discussion of these financial tools see American Bankers Association, *The Commercial Banking Industry*, 85-90 (1962). A more detailed treatment is contained in *The Federal Reserve System: Purposes and Functions*, 63 (1963), published by the Board of Governors of the Federal Reserve System.

Reserve Board raised the reserve requirements for its member banks. The State of Ohio, on the other hand, reduced its reserve requirements for members of its banking system.²⁹

The opinion below points to the fact that state banks can also join this Federal Reserve System (A: 47). But, this does not make national banks any less indispensable. As of June 30, 1967, national banks controlled approximately 71% of the total deposits of members of the Federal Reserve System.³⁰ Rather, the establishment of the Federal Reserve System (contrary to the view of the Court below)³¹ has enhanced the fiscal and economic role of national banks. The enormous growth of the Nation made the Federal Reserve System necessary as an addition to the Nation's existing banking structure. The Federal Reserve System, however, was a complement to, not a substitute for, the national banking system. Without the permanent availability and resources of national banks, the Federal Reserve System could not implement the monetary and fiscal policy of the Nation.

The opinion below also points to the fact that the authority of national banks to engage in general banking has grown.³² This fact was recognized by this Court in *Colorado National Bank v. Bedford*, 310 U.S. 41, 48 (1940). But national banks have always had a proprietary as well

²⁹ American Banker (December 29, 1967), p. 12. The Ohio Superintendent of Banks and Chairman of the Ohio Banking Board was quoted as saying: "for every \$6 or so that the Federal Reserve is pulling out of the credit channels, our action restores only about 40 cents."

³⁰ F.D.I.C. Report of Call No. 80, p. 3 (June 30, 1967). The total deposits as of this date for member national and state banks, respectively, were \$211,731,199,000 and \$86,431,503,000.

³¹ See page 46 of the Appendix.

³² See page 47 of the Appendix.

as a governmental nature. They have been privately owned and have conducted private banking activities since their origin; this was and still is a fundamental feature of the congressional scheme. For this reason any analysis of so-called "proprietary versus governmental" functions is inappropriate. This Court, moreover, has decided that such an analysis misconceives the nature of the delegated powers of the Federal Government. *Federal Land Bank of St. Paul v. Bismarck*, 314 U.S. 95, 102 (1941):

"The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 477. It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 32; *Graves v. New York ex rel. O'Keefe, supra*, 477."

Rather than following the decisions of this Court which have unequivocally sustained the tax immunity of national banks, the Court below relied on cases dealing with a licensee and lessees of government property, an employee of the Home Owners Loan Corporation, government contractors and a railroad.³³ Clearly, none of these cases involved the

³³ *City of Detroit v. Murray Corporation of America*, 355 U.S. 489 (1958). *United States v. Township of Muskegon*, 355 U.S. 484 (1958). *United States v. City of Detroit*, 355 U.S. 466 (1958). *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939). *James, State Tax Commissioner v. Dravo Contracting Co.*, 302 U.S. 134 (1937). *Railroad Company v. Peniston*, 18 Wall. 5 (1873).

taxation of a federal institution which even remotely resembles a national bank in character or function. In contrast to those decisions, this appeal involves national banks, which for over a century have had a permanent and continuing participation in the financial and economic affairs of the Federal Government. In this role they have been subject to a pervasive scheme of federal control. National banks, as members of the national banking system and Federal Reserve System, perform vital functions in implementing the fiscal and monetary policies of this Nation.

For these reasons, this Court could say with confidence that the status of national banks "as tax-immune instrumentalities of the United States is beyond dispute."³⁴ Congress has not seen fit to authorize the imposition of state sales and use taxes on national banks. Purchases by national banks, therefore, are exempt from the Massachusetts Sales and Use Taxes.

III. PURCHASES BY NATIONAL BANKS ARE IMMUNE FROM THE MASSACHUSETTS SALES TAX BECAUSE THE LEGAL INCIDENCE OF THE TAX IS ON PURCHASERS.

A. *This Court is Not Bound by the Determination of the Court Below as to the Legal Incidence of the Massachusetts Sales Tax, because Federal Rights are Involved.*

The Court below held that national banks, as purchasers, cannot claim any federal statutory or constitutional immunity from the Massachusetts Sales Tax because the Massachusetts Sales Tax is a tax imposed upon the seller of goods, not the purchaser. This Court has repeatedly held that it will not be bound by such a state Court characterization of

³⁴ *Department of Employment v. United States*, 385 U.S. 355, 360 (1966).

a state tax when the imposition of such a tax affects an asserted federal immunity or otherwise involves federal rights. If this were not so, federal rights and immunities could be avoided by the several states with impunity merely by characterizing a state tax to the state's advantage.

In *Society for Savings v. Bowers*, 349 U.S. 143 (1955), two mutual savings banks attacked the imposition of an Ohio property tax on the value of United States securities held in their portfolios. The Ohio Supreme Court upheld the tax as one on the "intangible property interests" of the depositors as owners of the banks. The Ohio Court regarded the bonds as merely the measure of the tax, not the subject matter of it. Speaking for this Court, Justice Harlan said:

"The Ohio court . . . has held that this tax is imposed on the depositors. But that does not end the matter for us. We must judge the true nature of this tax in terms of the rights and liabilities which the statute, as construed, creates. In assessing the validity of the tax under federal law, we are not bound by the state's conclusion that the tax is imposed on the depositors, even though we would be bound by the state court's decision as to what rights and liabilities this statute establishes under state law. The court's mere conclusion that the tax is imposed on the depositors is no more than a characterization of the tax. 'Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).'" (Footnote omitted.) 349 U.S. at 151.

This Court concluded (contrary to the Ohio Supreme Court) that the Ohio tax was upon the bonds held by the bank, and therefore invalid because of a federal statutory immunity established by Congress.

Although this Court has recognized that a state Court's interpretation of a taxing statute is binding as to questions of state law, such a construction is not determinative of whether the tax deprives the taxpayer of a federal right. Thus, it was said in *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 443 (1940):

"A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction."

This was also held in *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930), and *New Jersey Realty Title Insurance Co. v. Division of Tax Appeals*, 338 U.S. 665, 674 (1950).³⁵ See *Gallagher v. Crown Kosher Market*, 366 U.S. 617, 629 (1960), where this Court stated that the Massachusetts Court's characterization of a Sunday Law was not controlling in considering the statute's validity under the federal Constitution.

These well-established principles have been applied in cases (such as this appeal) involving federal immunity

³⁵ In *Federal Land Bank v. Bismarck Co.*, 314 U.S. 95, 99 (1941), there is language which indicates that a state Court's characterization of its tax is controlling. The respondents therein, however, conceded that the legal incidence of the tax was on the purchaser. Brief for respondents at 4. Hence this Court never had to focus on whether the state Court's decision was controlling. The *Bismarck* decision was decided well before most of the authorities relied upon by the appellant.

from state sales taxes. In *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110 (1954), this Court, in reversing the decision of the Supreme Court of Arkansas, held that the United States Government, rather than certain private contractors, was the purchaser; and hence it was unconstitutional to apply the Arkansas Gross Receipt Tax Law to the transaction therein involved. The Court was of the view that "... the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest" (347 U.S. at 110). To the identical effect is *United States v. County of Allegheny*, 322 U.S. 174, 184 (1944), and *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 84 (1946).

The latter case involved the imposition of a sales tax on oil sold for export. The California Supreme Court held that the incidence of the tax was on the vendor. This Court, in reversing the California Court's decision, held that the tax was an unconstitutional state excise on exports. With respect to the state Court's characterization of its tax as being on the seller for the privilege of conducting a retail business, rather than on the sale or because of the sale, this Court said:

"[I]t is not determinative of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect." 329 U.S. at 84.

Since the rights of the appellants under 12 U.S.C. § 548 (1964), and under the Constitution of the United States rest upon the characterization of the Massachusetts Sales Tax as a vendor or a vendee tax, the Supreme Judicial Court's

characterization of that tax as a vendor tax is not binding on this Court.

B. The Legal Incidence of the Massachusetts Sales Tax is on National Banks as Purchasers.

If this Court decides (as the appellant submits it must) that national banks are immune from state taxation except as set forth in 12 U.S.C. § 548 (1964), the subsidiary question of whether the Massachusetts Sales Tax is a tax on national banks as purchasers is raised.³⁶ The authorities in considering such questions have developed the so-called "legal incidence" test. An examination of the Massachusetts Sales Tax Statute and the controlling decisions of this Court clearly establish that the legal incidence of the Massachusetts Sales Tax is on purchasers and that the Supreme Judicial Court of Massachusetts was in error in holding to the contrary.

St. 1966, c. 14, § 1, subsec. 2, imposes an excise upon sales at retail in Massachusetts of tangible personal property. It is not a tax on the privilege of selling at retail, or a so-called "occupational tax." Rather, it is a tax imposed on the sale itself. The full amount of the tax must be *added* to the sales price and *collected* from the purchaser.

"Subsection 3. Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a

³⁶ As previously mentioned in footnote 3 on page 10, this case also involves the Massachusetts Use Tax, which is not even arguably on anyone but the purchaser.

debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts." (Emphasis supplied.)

Contrary to the opinion of the Court below, there is a severe penalty in the statute for a vendor's failure to add the tax to the sales price and collect it from a purchaser. A vendor's registration can be suspended or revoked. This means that an offending vendor can be prevented from doing business in Massachusetts. St. 1966, c. 14, § 1, subsec. 7. Subsection 7 provides in relevant part:

"No person shall do business in this commonwealth as a vendor unless a registration or registrations shall have been issued to him as hereinafter described.

"The commissioner may suspend or revoke the registration of any person or may refuse to issue any such registration for failure to comply with the provisions of this section³⁷ or with all pertinent rules and regulations of the commission promulgated hereunder."

(Emphasis supplied.)

³⁷ The reference to "this section" is a reference to section 1, which is the entire Sales Tax Act (including the provisions relating to the statutory duty to collect the tax), rather than just to the subsection itself. This is the obvious intent of the Legislature. Any possible doubt in this regard is completely dispelled by section 7 of chapter 64H of the General Laws, the permanent successor to subsection 7. In the General Laws, section 1 has become chapter 64H, and subsection 7 has become section 7. St. 1967, c. 757. In section 7 the reference to "this section" has been changed to "this chapter," which can only refer to the entire Sales Tax Act. The Massachusetts Sales Tax Act became permanent four months after the opinion below was published. Hence the Supreme Judicial Court was unaware of the phrase "this chapter" in section 7.

To emphasize that the vendor is a conduit acting only as a collector of the tax, not only must the tax be added to the sales price and collected from the consumer, but also the amount of the tax must be stated and charged separately from the sales price.

"Subsection 5. Upon each sale of tangible personal property taxable under the provisions of this section the amount of tax collected by the vendor from the purchaser under the provisions of this section shall be stated and charged separately from the sales price and shown separately on any record thereof at the time the sale is made, or on any evidence of sale issued or used by the vendor." (Emphasis supplied.)

Conversely, "In determining the 'sales price' there shall be excluded . . . the amount of reimbursement of tax paid by the purchaser to the vendor . . ." St. 1966, c. 14, § 1, subsec. 1(14)(c)(iv). In addition, it is unlawful for a vendor to advertise that the tax will be absorbed or assumed by the vendor or that it will not be added to the selling price.

Subsection 23. Unlawful advertising.—It shall be unlawful for any vendor to advertise or hold out or state to the public or any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the vendor or that it will not be added to the selling price of the property sold or, if added, it or any part thereof will be refunded. Whoever violates any provision of this subsection shall be punished by a fine of not more than one hundred dollars for each offense." (Emphasis supplied.)

The role of the vendor as tax collector is underscored by the fact that he receives compensation for collecting the tax. St. 1966, c. 14, § 1, subsec. 14.

The character of the Sales Tax as a tax on purchasers is thrown into even bolder relief by the numerous vendees who are exempt from the tax. Thus sales to the United States, the Commonwealth of Massachusetts or any political subdivision thereof and their respective agencies are exempt. Also exempt are sales to religious, scientific, charitable and educational organizations. St. 1966, c. 14, § 1, subsec. 6(d) and (e).

The conclusion drawn from this analysis that the Massachusetts Sales Tax is a tax on the purchaser is unquestionably supported by the authorities. The test developed and applied is whether the "legal incidence" of the tax falls on the vendor or the vendee. Under the pertinent decisions of this Court, the "legal incidence" of the Massachusetts Sales Tax is on the purchaser.

The leading case on this point is *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95 (1941), which held that the incidence of a North Dakota sales tax was on the purchaser, a Federal Land Bank, and hence sales to it were immunized from state taxation by congressional legislation. The sales-tax provisions were strikingly similar to those of the Massachusetts Act.³⁸ In holding that the

³⁸As quoted on pages 97n and 98n of the *Bismarck* opinion, the statute reads in relevant part:

"... There is hereby imposed ... a tax of two percent (2%) upon the gross receipts from all sales of tangible personal property, consisting of goods, wares, or merchandise ... sold at retail in the State of North Dakota to consumers or users; ...

"... Retailers shall add the tax imposed under this Act, or the average equivalent thereof, to the sales price or charge and when added such taxes shall constitute a part of such price or charge, shall be a debt from consumer or user to retailer until paid, and shall be recoverable at law in the same manner as other debts. . . .

"... It shall be unlawful for any retailer to advertise or hold

legal incidence of the North Dakota sales tax was on the purchaser, this Court said:

"It is clear that the North Dakota statute makes the purchaser, petitioner here, liable for the sales tax. Section 6 of the Act requires the retailer to add the tax to the sales price and declares the tax to be a debt from the consumer to the retailer. Section 7 makes it unlawful for the retailer to hold out that he will absorb or refund the tax in whole or in part. The Supreme Court of North Dakota has held that the sales tax is laid upon the purchaser." 314 U.S. at 99.



To the identical effect are *Carson v. Roane-Anderson Co.*, 342 U.S. 232 (1952), and *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110 (1954).

A converse situation was presented in *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41, 44 (1940). That case involved a 2% state tax on, *inter alia*, the value of safe-deposit services. The Colorado National Bank contended that it, as a federal instrumentality, was immune under 12 U.S.C. § 548 from the payment of a tax on the rentals it received for such services. This Court assumed the tax would be invalid if laid upon the bank, but held that the tax was upon the user of the safe-deposit boxes and not upon the bank. Hence the tax was valid. It based this conclusion on the ground that the tax statute required "... as far as practicable, [to] add the tax imposed . . . to the value of services or charges showing such tax as a separate and distinct item . . ." For this reason this Court was of

out or state to the public or to any consumer, directly or indirectly, that the tax or any part thereof imposed by this Act will be assumed or absorbed by the retailer . . ."

the view that the incidence of the tax was on the user of the safe-deposit box.

The state Courts have adopted the same test. The legal incidence of a sales tax which the vendor is required to collect from the purchaser is on the purchaser. Thus, in *Avco Manufacturing Corp. v. Connelly*, 145 Conn. 161, 171, 140 A. 2d 480, 484 (1958), the Court relied on *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110 (1954), in holding, *inter alia*:

"It is clear, however, under the decisions of the United States Supreme Court in *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 . . . and *State of Alabama v. King & Boozer*, 314 U.S. 1 . . . that a sales tax imposed upon a vendor who, in turn, is required to collect the tax from the purchaser is a tax upon the purchaser and that the imposition of such a sales tax in a transaction where the purchase is actually made for the government is unconstitutional."

The decisions in *National Bank of Hyde Park in Chicago v. Isaacs*, 27 Ill. 2d 197, 188 N.E. 2d 704 (1963), and *National Bank of Detroit v. Revenue Dept.*, 340 Mich. 573, 66 N.E. 2d 237 (1954), app. dism. *per curiam*, 349 U.S. 934 (1955), are in accord with the foregoing principle. Both decisions held that the legal incidence of each of the sales taxes in question was on the retailer (and hence a national bank as an instrumentality of the Federal Government was not exempt from any tax which might be passed on to it by a retailer). But these holdings were based upon the peculiar provisions of the sales tax statutes there involved: those statutes (unlike the Massachusetts Sales Tax) did not require the seller to pass on the tax or collect it from the purchaser. At best there was evidence indicating only that there was a custom of passing along the burden to the buyer.

Undoubtedly, if the sales-tax statutes in question in those cases *had required* the seller to collect the tax, the decisions would have placed the legal incidence of the tax on the purchaser.

The Michigan decision illustrates this point well. It relied completely on an earlier decision of the same court in *Federal Reserve Bank of Chicago v. Department of Revenue*, 339 Mich. 587, 64 N.W. 2d 639 (1954), which contained a complete discussion of the "legal incidence" question. That case held that a general sales tax on the privilege of engaging in the retail business as enacted in Michigan did not excuse retailers from including in the amount of their gross proceeds (used in computing their annual tax) proceeds from sales to the Federal Reserve Bank of Chicago. The basis for the decision was the Court's conclusion that the legal incidence of the tax was on the retailer. In answer to the plaintiff's contention that congressional legislation prohibited the levying of a sales tax on it, the Court said at page 593:

"It is important to note here that, as distinguished from the sales tax act provisions of some of the other States, the Michigan statute does not *require* the retailer to collect the tax from the purchaser or consumer." (Emphasis supplied.)

The Court elaborated upon the relevance of this requirement in a detailed analysis of the *Bismarck*, *King & Boozer* and *Kern-Limerick* decisions. In so doing it expressly distinguished the *Bismarck* decision on the ground that the North Dakota statute in that case *required* the retailer to collect the tax from the purchaser, thus imposing the legal incidence of the tax on the latter.

Also distinguishable is the statute involved in *Northwestern National Bank of Sioux Falls v. Gillis*, S.D., 148

N.W. 2d 293 (1967). The sales-tax statute in that case did not require the tax to be added to the sales price; it merely permitted it. Since the incidence of the tax was thus on the vendor, the Court held that a national bank could not be taxed on property which it sold.

The opinion of the Massachusetts Court below states that "A sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (A. 38). Despite this statement and despite the fact that a vendor is required to collect the Massachusetts Sales Tax, the Court below held that the legal incidence of the tax is on the vendor. As a basis for so holding, the Court erroneously assumed that the Massachusetts statute imposes no penalty on the vendor for failing to collect the tax from the purchaser. This error was the ground on which the Court distinguished the *Federal Land Bank v. Bismarck Lumber Co.* and *Alabama v. King & Boozer* decisions, stating that they were "clearly distinguishable" because they involved statutes which contained a penalty for a vendor's failure to collect the tax from the vendee (A. 39-40). It is submitted that the Supreme Judicial Court's reliance on this distinction is misplaced. First, the existence or nonexistence of such punitive measures (to which this Court in those cases made no reference) was not the basis of those decisions. In fact, in the *Federal Land Bank* case this Court noted that the "pertinent sections" of the North Dakota sales tax were set forth in the margin. There were no penalty provisions so set forth. Second (as previously demonstrated), the Massachusetts Sales Tax Act does contain a penalty for a vendor who fails to collect a tax. The vendor's registration can be suspended or revoked and he can be required to cease doing business in Massachusetts. St. 1966, c. 14, § 1, subsec. 7.

The teaching of the decisional law is clear. Where a sales tax is required to be added to the sales price and collected

from a purchaser, the legal incidence of that tax is on the purchaser. This, of course, is precisely the nature of the Massachusetts Sales Tax. St. 1966, c. 14, § 1, subsec. 3, expressly provides that ". . . each vendor in this commonwealth *shall add to the sales price and shall collect from* the purchaser the full amount of the tax . . ." (Emphasis supplied.) Moreover, there is a penalty for a vendor's failure to so add and collect the tax. His registration can be suspended or revoked and he can be required to cease doing business in Massachusetts. The tax, furthermore, must be stated and charged separately from the sales price. In addition, vendors cannot advertise that they will absorb or assume it.

Since federal rights are involved, this Court is free to, and should, decide *de novo* the question of the legal incidence of the Massachusetts Sales Tax. By reason of the provisions of the Massachusetts Sales Tax statute, the answer to this question must be that the legal incidence of the tax is on the purchaser.

Conclusion.

The appellant submits that the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts should be reversed. This Court should declare that the imposition of the Massachusetts Sales and Use Taxes on purchases by the appellant is repugnant to the laws and Constitution of the United States.

If this Court should decide (as appellant submits it should not) that the Massachusetts Sales Tax is a tax on vendors, this Court should nevertheless reverse the Court below with respect to the application of the Massachusetts Use Tax to purchases by appellant. In such event, this

Court should also declare that the Massachusetts Sales Tax may not be imposed on sales by appellant.

Respectfully submitted,

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Brief Appendix.**United States Code, Title 12—Banks and Banking.****NATIONAL BANK SHARES****§ 548. State taxation.**

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and

business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

4. The provisions of section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the States of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R. S. § 5219; Mar. 4, 1923, ch. 267, 42 Stat. 1499; Mar. 25, 1926, ch. 88, 44 Stat. 223.)

Acts and Resolves.**STATUTE 1966, CHAPTER 14.**

[Advance Copy, 1966 Massachusetts Acts and Resolves,
Pages 6-55.]

TAXATION OF RETAIL SALES OF TANGIBLE PERSONAL PROPERTY.

SECTION 1. A tax on retail sales is imposed in accordance with the following subsections;—

Subsection 1. Definitions.—When used in this section the following words, terms and phrases shall have the following meaning except where the context clearly indicates a different meaning:—

(1) “Sales price”, the total amount paid by a purchaser to a vendor as consideration for a retail sale, valued in money or otherwise.

(c) In determining the “sales price” there shall be excluded . . . (iv) the amount of reimbursement of tax paid by the purchaser to the vendor under section; . . .

IMPOSITION AND RATE OF TAX.

Subsection 2. An excise is hereby imposed upon sales at retail of tangible personal property in this commonwealth by any vendor at the rate of three per cent of the gross receipts of the vendor from all such sales of such property, except as otherwise provided in this section.

Subsection 3. Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of

the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof; and such tax shall be a debt from the purchaser to the vendor, when so added to the sales price, and shall be recoverable at law in the same manner as other debts.

Subsection 4. For the purpose of adding and collecting the tax imposed by this section, or an amount equal as nearly as possible or practicable to the average equivalent thereof, to be reimbursed to the vendor by the purchaser, the following formula shall be in force and effect as follows:—

<i>Amount of Sale.</i>	<i>Amount of Tax.</i>
\$0.01 to \$0.18 inclusive	No tax
.19 to .38 inclusive	1 cent
.39 to .78 inclusive	2 cents
.79 to 1.18 inclusive	3 cents

In addition to a tax of three cents on each full dollar, a tax shall be collected on each part of a dollar in excess of a full dollar in accordance with the above formula.

Subsection 5. Upon each sale of tangible personal property taxable under the provisions of this section the amount of tax collected by the vendor from the purchaser under the provisions of this section shall be stated and charged separately from the sales price and shown separately on any record thereof at the time the sale is made, or on any evidence of sale issued or used by the vendor.

Subsection 6. Exemptions.—The following sales and the gross receipts therefrom shall be exempt from the tax imposed by this section:—

(a) Sales which the commonwealth is prohibited from taxing under the constitution or laws of the United States.

(d) Sales to the United States, the commonwealth of Massachusetts or any political subdivision thereof, or their respective agencies.

(e) Sales to any corporation, foundation, organization or institution, organized exclusively for religious, scientific, charitable or educational purposes, including hospitals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; . . .

(f) Sales of tangible personal property through coin operated vending machines at ten cents or less, provided the retailer is primarily engaged in making such sales and keeps records satisfactory to the commission.

REGISTRATION OF VENDORS.

Subsection 7. Registration of Vendors.—(a) Application for Registration. No person shall do business in this commonwealth as a vendor unless a registration or registrations shall have been issued to him as hereinafter described. Every person desiring to do business in this commonwealth as a vendor shall file with the commissioner for each place of business an application for registration, in such form as the commissioner with the approval of the commission, prescribes, giving such information as the commissioner requires. At the time of making the application, such person shall pay to the commissioner a registration fee of one dollar for each registration.

(b) Issuance of Registration. After compliance with the provisions of paragraph (a) by the applicant, the commissioner may issue to such applicant a separate certificate of registration for each place of business within the commonwealth. The certificate of registration shall not be

assignable; shall be valid only for the person in whose name it is issued and for the transaction of business at the place designated therein; and shall at all times be conspicuously displayed at the place for which issued.

(c) *Suspension or Revocation of Registration.* The commissioner may suspend or revoke the registration of any person or may refuse to issue any such registration for failure to comply with the provisions of this section or with all pertinent rules and regulations of the commission promulgated hereunder. Any person aggrieved by such suspension, revocation or refusal may, within ten days after written notice thereof has been mailed or delivered to him, apply to the commission for a hearing setting forth in such application a full statement of the grounds on which he intends to rely; provided, that he has filed with the commission at the time of making such application a surety company bond running to the commonwealth, with a surety company authorized to do business in the commonwealth as surety, in such sum as the commission shall fix, conditioned upon the payment of all taxes then due under this section and to become due during the pendency of such appeal to the commission and of any further appeal to the appellate tax board or to the supreme judicial court. After such hearing, the commission shall give written notice of its decision. Any person aggrieved by a decision of the commission under this section may appeal therefrom to the appellate tax board within ten days after such written notice has been mailed or delivered to him. Such appeals to the appellate tax board shall be preferred cases to be heard, unless cause appears to the contrary, in priority to other cases. During the pendency of any such appeal to the commission or to the appellate tax board or to the supreme judicial court, the suspension or revocation so appealed from shall be inoperative. In the case of an

appeal from the refusal of the commissioner to issue a registration, the commissioner shall issue such registration during the pendency of the appeal.

A person whose registration has been suspended or revoked shall pay to the commissioner a fee of five dollars for the reissuance of a registration. The commissioner shall not issue a new registration after the suspension or revocation of a registration unless he is satisfied that the former holder of the registration will comply with the provisions of this section and with all pertinent rules and regulations thereunder.

(d) *Failure to Register.* Any person who fails to register as required by this subsection and does business in this commonwealth as a vendor shall be punished by a fine of not less than two hundred dollars nor more than five hundred dollars. The superior court may on petition of the commissioner restrain such person from doing business as a vendor in this commonwealth.

RETURNS AND PAYMENT OF TAX.

Subsection 9. Filing of Returns.—On or before the twentieth day of each calendar month, each vendor who has made any sale at retail taxable under the provisions of this section during the preceding calendar month shall file a return with the commissioner. Such returns shall be filed upon a form furnished by the commissioner and approved by the commission and containing such information reasonably necessary for the administration of this section as the commissioner may require. The commission may by regulation require returns under this section to be filed on a quarterly rather than a monthly basis. Upon application of a vendor, the commissioner may issue a classified permit establishing such vendor's percentage of exempt

sales. Such classified permits may be amended or revoked as to classification whenever the commissioner shall determine that the percentage of exempt sales is inaccurate or that such classification is not appropriate.

Subsection 10. Payment of Tax.—At the time of filing his return as provided by this section, the vendor shall pay to the commissioner the taxes imposed by this section. The taxes for the period for which a return is required to be filed by a vendor under this section shall be due and payable to the commissioner on the date established for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of gross receipts and taxes due thereon.

Subsection 14. Compensation for Collecting Tax.—For the purpose of defraying in whole, or in part, his expenses in keeping the records prescribed and collecting and remitting the tax imposed by this section, the taxpayer shall be entitled to deduct and withhold from the taxes otherwise due from him two per cent thereof, provided he has complied with all of the requirements of this section and all pertinent rules and regulations of the commission promulgated hereunder.

Subsection 15. Assessment of tax.—(a) In General.—The tax imposed by this section shall be deemed to be assessed at the amount shown as the tax due on the return filed under the provisions of this section and on any amendment, correction or supplement thereof or at the amount properly due under this section; whichever is less.

(b) Assessment of Deficiencies.—If the commissioner determines from the verification of a return, or otherwise, that the full amount of any tax due under this section, or

any portion thereof, has not been assessed or is not deemed to be assessed, he may, at any time within three years after the date the return was filed or the date it was due, whichever occurs later, assess the same with interest as provided in subsection nineteen to the date when the deficiency assessment is required to be paid hereunder, first giving notice to the vendor to be assessed of his intention; and such vendor or a representative of the vendor shall thereupon have an opportunity, within thirty days after the date of such notification, to confer with the commissioner or his duly authorized representative as to the proposed assessment. After the expiration of thirty days from the date of such notification, the commissioner shall assess the amount of the tax remaining due the commonwealth, or any portion thereof, which he believes has not theretofore been assessed and shall give notice to the vendor so assessed. One or more deficiency assessments may be made of the amount due for one or for more than one period. Any tax so assessed shall be paid to the commissioner within fourteen days after the date of the notice of assessment.

In the case of an arithmetic or clerical error apparent upon the face of the return, the commissioner may assess a deficiency attributable to such error without giving prior notice of his intention to the vendor to be assessed.

(c) *Refund of Overpayments.*—If, on the verification of a return, or otherwise, the commissioner determines that an overpayment of the full amount of any tax, and interest and penalties thereon, due under this section with respect to such return has been made by the vendor, the amount of such overpayment may, in his discretion, be deducted from any unpaid amounts due for other periods or on other returns of the vendor. The balance of such overpayment shall be refunded to the vendor if it exceeds ten dollars; if such balance is ten dollars or less, it may be

refunded in the discretion of the commissioner. Interest upon such refund at six per cent per annum shall be paid from a date six months after the date of the payment of said amount to the commissioner, the date upon which the return was due or the date upon which the return was filed, whichever is the latest.

(d) *Extension by Agreement.*—If, before the expiration of the time prescribed under paragraph (b) for the assessment of any deficiency, the commissioner and the vendor consent in writing to extend the time for the assessments of any deficiency, the commissioner or his duly authorized representative may inspect and examine the records of the vendor as provided in subsection twelve, may give any notice of intention to assess required by this subsection and may assess any deficiency at any time prior to the expiration of the extended time. The period so extended by the commissioner and the vendor may be further extended by subsequent agreements in writing made before the expiration of the time last extended.

(e) *Exceptions to Assessment Limitation.*—The commissioner may assess the tax imposed by this section at any time if a vendor has filed no return; has filed a false or fraudulent return with intent to evade the tax imposed by this section; or has filed a return with a wilful attempt in any manner to defeat or evade the tax imposed by this section.

(f) *Notice of Assessment.*—If the assessment of any tax is in excess of the amount shown on the return as the tax due, the commissioner shall, as soon as may be, give written notice to the vendor of the amount of the assessment, the amount of any balance due and the time when the same is required to be paid, but failure to receive such notice shall not affect the validity of the tax.

Subsection 16. Collection of Unpaid Taxes.—Assessed taxes remaining unpaid after the date upon which the same

are required to be paid shall bear interest at the rate of six per cent per annum until paid, which shall be added to and become part of the tax. Every person who fails to pay to the commissioner any sums required by this section shall be personally and individually liable therefor to the commonwealth. The term "person", as used in this subsection, includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee or member is under a duty to pay over the taxes imposed by this section:

Subsection 17. Remedies for Collection.—The commissioner shall have for the collection of taxes imposed by this section all the powers and remedies provided by chapter sixty of the General Laws for the collection of taxes on personal estate by collectors of taxes of towns. Any warrant for the collection of a tax imposed under this section may be issued to any deputy collector, sheriff, deputy sheriff or constable, and he shall have authority to proceed thereunder anywhere within the commonwealth. The officer, to whom a warrant for the collection of such a tax is given, shall collect said tax, penalties and interest as herein provided, including the charges and fees provided in section fifteen of chapter sixty, and shall pay over such amounts collected to the commissioner. Such officer, other than a deputy collector, may collect and receive for his fees the sum which an officer would be entitled by law to receive upon an execution for a like amount.

The commissioner may recover any tax imposed by this section in an action of contract in the name of the commonwealth. Any tax imposed by this section may also be collected by any information brought in the supreme judicial court by the attorney general at the relation of the commissioner. The court may issue an injunction upon such information, restraining the further prosecution of

the business of the vendor until such taxes, with interest and costs thereon, have been paid.

Interest, penalties and additional taxes imposed under this section may be recovered in the manner provided for in this subsection.

Subsection 18. Jeopardy Assessments.—If the commissioner believes that the collection of any tax imposed by this section will be jeopardized by delay, he shall, whether or not the time otherwise prescribed by law for making return and paying such tax has expired, immediately assess such tax (together with all interest and penalties, the assessment of which is provided for by law). Such tax, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the commissioner for the payment thereof. Upon failure or refusal to pay such tax, penalty and interest, the commissioner shall proceed forthwith to the collection thereof.

Subsection 19. Interest and Penalties.—(a) *Interest.*—All taxes imposed by this section shall be due and payable on or before the due date of the return, determined without regard to any extension of time. The portion of any taxes not paid on or before said date shall bear interest from said date at the rate of one half of one per cent per month, or major fraction thereof, until it is paid. Deficiency assessments made under subsection fifteen and additional taxes assessed under paragraph (c) of this subsection shall include interest as provided in this subsection to the date when the tax so assessed or any unpaid balance thereof is required to be paid. Interest so assessed shall become a part of the tax.

(b) *Penalty for Late Returns.*—If any vendor required to file a return under this section fails to file such return within the time prescribed by this section, there shall be

added to and become a part of the tax, as an additional tax, a sum equal to one half of one per cent of the tax ultimately determined to be due for each month, or major fraction thereof, that the vendor is in default, but not less than ten dollars.

(c) *Additional Tax.*—If a vendor who has been notified by the commissioner that he has failed to file a return or has filed an incorrect or insufficient return, refuses or neglects within thirty days after the date of such notification to file a proper return, or if a vendor has filed a false or fraudulent return or has filed a return with a wilful attempt in any manner to defeat or evade the tax, the commissioner shall determine, according to his best information and belief, the sales and gross receipts of such vendor taxable under this section and shall assess the same at not more than double of the amount so determined, which additional tax shall be in addition to the other penalties provided by this section.

Subsection 20. Abatement of Taxes.—If the tax shown on the return filed by any person pursuant to this section is believed to be excessive or illegal, such person may apply in writing to the commission, upon a form approved by the commission, for an abatement thereof at any time within three years from the last day for filing such return, determined without regard to any extension of time. Any person aggrieved by the assessment of any tax imposed by this section may apply in writing to the commission, upon a form approved by the commission, for an abatement thereof at any time within two years after the date upon which the notice of assessment is sent. The commission shall, if requested, give the applicant a hearing upon his application; and if the commission finds that the tax is excessive in amount or illegal, the commission shall abate the tax in whole or in part accordingly.

If an abatement is granted and the tax has been paid, the state treasurer, upon certification of the commission, shall repay to the person who paid the tax the amount of such abatement, with interest thereon at the rate of six per cent per annum from the time when it was paid; provided, that if such person is a vendor who has collected reimbursement of such tax, no actual refund of money shall be made to such vendor until he shall first establish to the satisfaction of the commission, under such regulations as it may prescribe, that the vendor has repaid to the purchaser the amount for which the application for refund is made. In lieu of any refund required to be made, a credit may be allowed therefor on payment due from the applicant. The commission shall give notice to the applicant of its decision upon any application for abatement under this subsection.

Subsection 21. Limitation of Abatements.—No tax assessed on any person liable to taxation under this section shall be abated in any event unless the person assessed shall have filed, at or before the time of bringing his application for abatement, a return as required by subsection nine for the period to which his application relates; and if he failed without good cause to file his return within the time prescribed by law, or filed a fraudulent return, or having filed an incorrect or insufficient return, has failed, after notice, to file a proper return, the commission shall not abate the tax below double the amount for which the person assessed was properly taxable under this section.

Subsection 22. Appeal to Appellate Tax Board.—Any person aggrieved by the refusal of the commission to abate, in whole or in part, under subsection twenty a tax assessed or collected under this section, may appeal therefrom within ninety days after the date of the notice of the decision of the commission, or within six months after the time when the application for abatement is deemed to be denied, as

provided by section six of chapter fifty-eight A of the General Laws, by filing a petition with the clerk of the appellate tax board. If, on hearing, said board finds that the person making the appeal was entitled to an abatement under subsection twenty from the tax assessed on him, it shall make such abatement as it sees fit. Findings of fact of the appellate tax board shall be final and conclusive, and shall be communicated in writing to the petitioner and the commission within five days thereafter. If a tax so abated has been paid, the state treasurer, upon presentation to him of the notice of the decision of the board, shall repay to the petitioner the amount of the abatement and interest at the rate of six per cent per annum from the date of payment or the due date of the return, whichever is later.

The remedies provided by this subsection and subsections twenty and twenty-one shall be exclusive.

~~PROHIBITION AND PENALTIES.~~

Subsection 23. Unlawful Advertising.—It shall be unlawful for any vendor to advertise or hold out or state to the public or any customer, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the vendor or that it will not be added to the selling price of the property sold or, if added, it or any part thereof will be refunded. Whoever violates any provision of this subsection shall be punished by a fine of not more than one hundred dollars for each offense.

TAXATION OF THE STORAGE, USE OR OTHER CONSUMPTION OF TANGIBLE PERSONAL PROPERTY.

SECTION 2. A tax on the storage, use or other consumption of tangible personal property is imposed in accordance with the following subsections:

IMPOSITION AND LIABILITY FOR TAX.

Subsection 2. Imposition and Rate of Tax.—Except as otherwise provided in this section an excise is hereby imposed upon the storage, use or other consumption in this commonwealth of tangible personal property purchased from any vendor for storage, use or other consumption within this commonwealth at the rate of three per cent of the sales price of the property.

Subsection 3. Liability of User.—Every person storing, using or otherwise consuming in this commonwealth tangible personal property purchased from a vendor shall be liable for the tax imposed by this section. His liability shall not be extinguished until said tax has been paid to the commissioner, except that a receipt from a vendor engaged in business in this commonwealth or from a vendor who is authorized by the commissioner, under such regulations as the commission may prescribe, to collect the tax and who is, for the purposes of this section, regarded as a vendor engaged in business in this commonwealth, given to the purchaser pursuant to subsection four of this section, shall be sufficient to relieve the purchaser from further liability for the tax to which the receipt refers.

Subsection 4. Liability of Vendor.—Every vendor engaged in business in this commonwealth and making sales of tangible personal property for storage, use or other consumption in this commonwealth not exempted under this section, shall at the time of making the sales, or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the commissioner. The tax required to be collected by the vendor shall constitute a debt owed by the vendor to

this commonwealth. For the purpose of uniformity of tax collection by the vendor and for other purposes the provisions of subsections three, four and five of section one are hereby incorporated in and made applicable to this section.

EXEMPTIONS.

Subsection 5. Exemptions.—The tax imposed by this section shall not apply to the following:

- (a) Sales upon which taxes are imposed under section one of this act.
- (b) Sales exempt from the taxes imposed under section one of this act; . . .

RETURNS AND PAYMENT OF TAX.

Subsection 9. Returns and Payment of Tax.—The provisions of subsections nine, ten, eleven and thirteen of section one of this act are hereby incorporated in and made applicable to this section. Every vendor who is required or expressly authorized to pay the tax imposed by this section shall file returns and pay the tax in accordance with the provisions of such subsections applicable to the filing of returns and the payment of the tax and as shall be prescribed by regulations of the commission.

Subsection 10. Monthly Returns—Content and Form—Payment of Tax by Purchaser.—(a) *Filing Returns.*—Every purchaser who is required to pay a tax under this section shall file a return with the commissioner within twenty days after the end of each calendar month. Such returns shall show the total sales prices of all tangible personal property purchased at retail sale upon which the tax imposed has not been paid by the purchaser to vendors, the amount of tax for which the purchaser is liable,

and such other information as the commissioner deems necessary for the computation and collection of the tax. The commission may by regulation require returns under this subsection to be filed on a quarterly rather than a monthly basis.

(b) *Contents of Return.*—The return filed by a purchaser shall include the sales prices of all tangible personal property purchased as taxable retail sale during the calendar month or other period for which the return is filed and upon which the tax imposed has not been reimbursed by the purchaser to vendors.

(c) *Payment of Tax.*—At the time of filing his return as provided in this subsection the purchaser shall pay to the commissioner the amount of tax for which he is liable as shown by the return.

ASSESSMENT, COLLECTION, ADMINISTRATION, ENFORCEMENT, ABATEMENTS AND APPEALS.

Subsection 11. The assessment and collection of the tax imposed by this section, the administration and enforcement thereof, the abatement of taxes imposed by this section, and the rights and procedure for appeals shall be governed by the provisions of subsections fifteen to twenty-two, inclusive, of section one of this act, which provisions are hereby incorporated in and made applicable to this section. For the purposes of this section said provisions shall be construed to apply to any purchaser who becomes liable to taxation under this section.

PROHIBITION AND PENALTIES.

Subsection 12. Unlawful Advertising.—It shall be unlawful for any vendor to advertise or hold out or state to the public or any customer, directly or indirectly, that the

tax or any part thereof will be assumed or absorbed by the vendor or that it will not be added to the selling price of the property sold or, if added, it or any part thereof will be refunded. Whoever violates any provision of this subsection shall be punished by a fine of not more than one hundred dollars for each offense.

Subsection 13. Criminal Penalties.—Any vendor or purchaser who wilfully fails to file a return required by this section when due, or wilfully files an incorrect or insufficient return, or, with intent to evade taxation, files no return or a false or fraudulent return or submits a false certificate, affidavit or other statement to the commissioner or the commission relating to the amount of tax for which he is liable, shall be punished by a fine of not less than one hundred nor more than ten thousand dollars, or by imprisonment for not more than one year, or both.

STATUTE 1966, CHAPTER 483.

[Advance Copy, 1966 Acts and Resolves, Pages 453-454.]

SECTION 1. Subsection 3 of section 1 of chapter 14 of the acts of 1966 is hereby amended by adding the following paragraph:—

Notwithstanding the provisions of this subsection, the excise imposed by subsection two of this section or by subsection two of section two upon sales at retail, or upon the storage, use or other consumption of motor vehicles or trailers shall be paid by the purchaser to the registrar of motor vehicles in the manner prescribed by the commissioner. The vendor thereof shall not add the tax to the sales price and shall not collect the tax from the purchaser. The vendor thereof shall, however, furnish to the purchaser, the registrar and the commissioner a sworn statement of the sale upon a form prescribed by the commis-

sioner, with the approval of the commission, giving such information as the commissioner may require for the determination of such tax.

SECTION 2. This act shall take effect on November first, nineteen hundred and sixty-six. *Approved August 8, 1966.*

Massachusetts Sales and Use Tax Emergency Regulations.

EMERGENCY REGULATION No. 6

National Banks—Federal Savings and Loan Associations

The sale, lease or rental of tangible personal property to national banks and Federal savings and loan associations is subject to the sales and use tax.

National banks and Federal savings and loan associations making sales of tangible personal property must collect the sales tax to the same extent as other vendors making such sales.

STATE TAX COMMISSION
Guy J. Rizzotto,—Chairman
Leo E. Diehl
Donald T. Wood

May 31, 1966

A true copy

Attest:

Neil P. Shea

Executive Assistant

Massachusetts State Tax Commission



SUPREME COURT, U. S.

FILED

No. 755

MAR 28 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

Appellee.

On Appeal From The Supreme Judicial Court
For The Commonwealth Of Massachusetts

MOTION OF THE NATIONAL ASSOCIATION OF
SUPERVISORS OF STATE BANKS FOR
LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

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FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,

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v.

STATE TAX COMMISSION,

Appellee.

**MOTION OF THE NATIONAL ASSOCIATION OF
SUPERVISORS OF STATE BANKS FOR
LEAVE TO FILE A BRIEF AS AMICUS CURIAE**

The National Association of Supervisors of State Banks (hereinafter called the "Supervisors") is an association composed of the officials of state governments responsible for the supervision of state-chartered banking institutions in every state of the United States and in Puerto Rico and the Virgin Islands. As of June 30, 1967, its fifty-two members supervised 9487 commercial and mutual savings banks chartered under state law with total assets in excess of 237 billion dollars.

The question before the Court in this case is whether or not the State of Massachusetts may impose a general sales and use tax on a national bank.

The decision of the Court will, however, affect the banking structure in every state in the United States.

Simply stated, there is a congressionally created dual-banking system in this country.¹ Of the more than 14,000 banks, approximately 66% are chartered and supervised by the states ("state banks") while 34% are chartered and supervised by the federal government ("national banks").

The Supervisors have taken an active role both before the courts² and the Congress in matters which involve the basic strengths of this system, i.e., the ability of both national and state banks to compete effectively. The question now before this Court—whether national banks can escape nondiscriminatory taxation imposed upon state banks—is obviously one which vitally affects the ability of state banks to compete with national banks.

The Supervisors believe they can assist this Court in two specific areas: (1) by providing a history of the dual-banking system in the United States which places in perspective the role of state and national banks in relation to the federal government, and (2) by evaluating and presenting to the Court the nation-wide effect which the decision in this case will have upon the dual-banking system.

These are areas which by virtue of the parties individual interests—the appellant national bank in avoiding tax

¹ See *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966).

² For example, the Supervisors filed a brief to this Court as amicus curiae in *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411 (1965), to the 5th Circuit in *Jackson v. First Nat'l Bank of Valdosta*, 349 F.2d 71 (1965), and to the 10th Circuit in *Walker Bank & Trust Co. v. Saxon*, 352 F.2d 90 (1965).

liability and the appellee tax commission in broadening the state's tax base—are unlikely to be presented to the Court absent the participation of the Supervisors. Further, because of their responsibility of regulating more than half of the banks in the United States, Puerto Rico, and the Virgin Islands, the Supervisors are uniquely fitted to supply this broader framework for the Court's decision.

Finally the Supervisors have an interest distant from that of the parties. They have the responsibility to see that the banks they regulate are not only financially sound but are able to adequately serve the needs of their communities. To the extent that state banks are required to compete with other banks that are immune from taxation this foundation is compromised. No party before this Court can reasonably be expected to represent this vital public interest.³

³ In a recent case involving the construction of Section 36 of the National Bank Act, 12 U.S.C. § 36, the United States Court of Appeals for the District of Columbia Circuit held that "where protection of the competitive equality of state banks is the core of the federal statute controlling the branching of national banks, a state banking commissioner has an adequate interest in the construction of the federal act to justify intervention." *Nuesse v. Camp*, 385 F.2d 694, 701 (1967). It has also been held that state bank supervisors have the standing to bring suit to challenge actions of the Comptroller of the Currency in authorizing a branch which would, in the Supervisor's view, be an unlawful action having an adverse competitive effect upon state banks subject to his jurisdiction. *Jackson v. First National Bank*, 349 F.2d 71 (5th Cir. 1965).

CONCLUSION

For the foregoing reasons, the National Association of Supervisors of State Banks requests that its motion for leave to file a brief as amicus curiae be granted.

Respectfully submitted,

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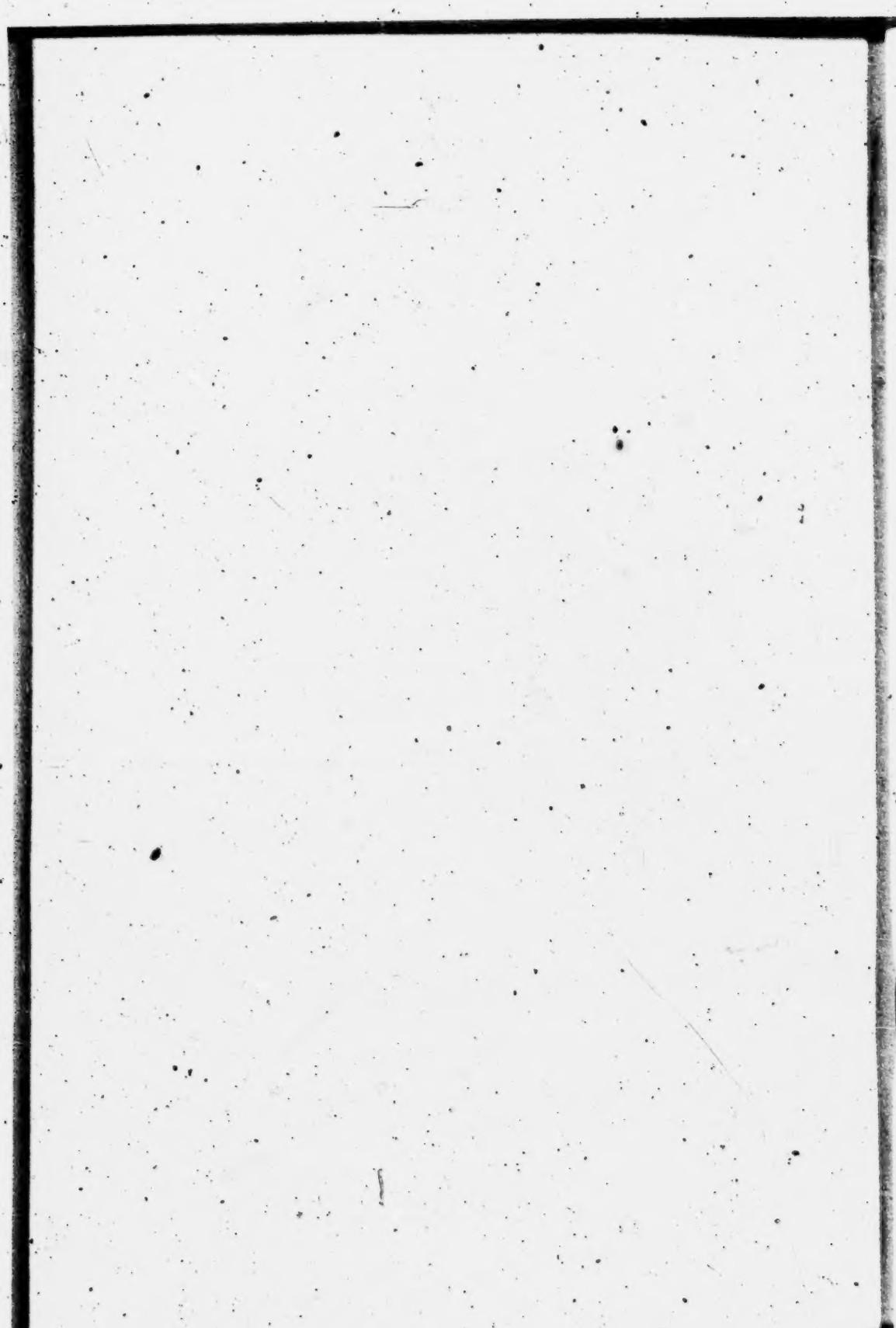
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SUPREME COURT, U. S.

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MAR 29 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 755

FIRST AGRICULTURAL NATIONAL BANK OF
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Appellant,

v.

STATE TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE
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Federal Deposit Insurance Corp., <i>Assets, Liabilities and Capital Accounts, Commercial and Mutual Savings Banks</i> , 6/30/65	25
<i>Financial History of the United States</i> , Studenski and Kroos (McGraw-Hill, 1952), pp. 83-88, 103-106	13
<i>Financial History of the United States</i> , Studenski and Kroos (McGraw-Hill, 1952), p. 393	22
<i>State Taxation of Interstate Commerce</i> , 89th Cong., 1st Sess., H. Rpt. No. 565, p. 608	50
<i>The Economics of Money and Banking</i> , Letter V. Chandler, 3d Ed., 1959	9
<i>The Federal Reserve System, Purposes and Functions</i> , 1963	21
<i>1961 U. S. Code Cong. & Admin. News</i> , Vol. 2, pp. 2006-2007	40
<i>1964 U. S. Code Cong. & Admin. News</i> , Vol. 2, p. 2305	26
<i>U. S. Code Congressional Service</i> , 1945, pp. 887-907	28
<i>U. S. Code Congressional Service</i> , 1949, pp. 1381-1394	28
<i>U. S. House Reports</i> , Vol. III; Rept. No. 1078, 67th Cong., 1922-1923, pp. 1-2	37
<i>U. S. Senate Reports</i> No. 694, pp. 1-8	45
<i>U. S. Senate Reports</i> , Vol. I, Rept. No. 986, 67th Cong., 1922-1923, pp. 1-4	37
<i>U. S. Senate Misc. Reports</i> , 83rd Cong., 1st Sess., Vol. III	45
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1952-53 Annual Report of the State Tax Commission, 1953 Leg. Doc. No. 99, pp. 45-48	56

Supreme Court of the United States

October Term, 1967

No. 755

FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

**BRIEF AMICUS CURIAE ON BEHALF OF THE STATE
OF NEW YORK**

Statement

Since the appeal was taken in the captioned case, the New York State Court of Appeals unanimously decided *Liberty National Bank and Trust Co. v. Buscaglia, et al.* on December 27, 1967. This case is reported at 21 N. Y. 2d 357, and the opinion of the Court (KEATING, J.) is reproduced as Appendix B hereto.

The *Liberty Bank* decision, *supra*, sustained the constitutionality of sales and use taxes imposed under New York State and local laws upon retail sales transactions entered into by Liberty National Bank of Buffalo, New York.

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This brief is submitted in support of the principles that national banks are not entitled to implied constitutional or statutory immunity from such taxation.

While we have received a copy of appellant's brief herein, we have not yet received one from the appellee as of the date of this brief.

Question Presented

Whether national banks, privately owned and operated for private gain, as are State banks, are immune from non-discriminatory State and local sales taxation.

Summary of Argument

We shall argue and demonstrate that a national bank is not today a Federal instrumentality and has no immunity from State and local sales taxes.

It is crystal clear that the term "Federal instrumentality", for purposes of constitutional immunity, means different things at different times and for different purposes. Immunity may be gained or lost depending upon whether a Federal function is actually performed or not. In the case of national banks, the term "Federal instrumentality" is a complete misnomer, and this immunity has been lost. They now stand upon entirely different footings from the national banks of an earlier-by-gone day when they once enjoyed immunity; footings which this Court and the Congress itself have since rebuilt in many different ways so that they no longer perform the governmental functions which had given birth to the immunity doctrine long ago. There is and can be no dispute as to this, and appellant's mere and unfounded assertion that it is a Federal

instrumentality is neither justified nor relevant under present circumstances.

When as here, governmental functions have ceased to exist, then the basis for an assertion of a doctrine of implied immunity has no justification and it is wholly inapplicable. We shall also clearly demonstrate that national banks presently function with respect to their depositors within the Nation's Federal Reserve System, in full functional parity with State banks belonging to that very same system, and both State and National banks are in banking competition with each other under their respective governing legislation (*i.e.*, the National Banking Act, 12 U. S. C. A. §§21, *et seq.*; New York State Banking Law). National banks perform no function for the Federal government which is not similarly performed by State banks within the Federal Reserve System. Both are free to convert from one to the other and back again in their discretion under the cited governing statutes.

When Liberty Bank converted from a State bank, for example, to a National bank, it did not acquire any new or different status or relationship to the Federal government than it had before. The only banking changes which occurred by its conversion were solely in areas involving *private* banking as a result of enlarged authorization under the National Banking Act to engage in additional private banking activities, presently denied to New York banks by New York Law. (See *Report of the Advisory Committee on Commercial Bank Supervision*, submitted to the Superintendent of Banks of the State of New York, December 1965.) This contains a comprehensive report of these additional private banking activities. (See also 1966 *Report of the Joint Legislative Committee to revise the Banking Law*, 1966 Leg. Doc. No. 39.) Amendatory New York State

legislation would have been required in certain areas for State banks to do what national banks may do.¹ Chapter 324 of the Laws of 1966 for example, was enacted to permit State banks additional banking activities in eight of these areas. (See 1966 Annual Report of the Superintendent of Banks, 1967 Leg. Doc. No. 90, pp. 9-10.)

By reason of both the sharp curtailment of the application of the immunity doctrine (*infra*) and of the profound changes in the banking functions of national banks, extreme caution is required in the interpretation and application of earlier cases now isolated by time and place which had evoked the doctrine under entirely different legal and factual circumstances. This mandates a rigid and analytical delineation between the earlier cases for purposes of their modern application, since all must be interpreted and compared in the light of the precise governmental agency and of the precise governmental activity involved.

Since § 548 of the U. S. C. A. is not the *sole* measure for taxing national banks, they have no statutory immunity thereunder from non-discriminatory sales and use taxes imposed by the States. The section does not prohibit these taxes, but applies solely to those taxes enumerated therein.

¹ These areas are:

- (1) Direct Lease Financing; (2) Accounts Receivable Financing; (3) Negotiable Promissory Notes; (4) Domestic Branches; (5) Federal Funds Transactions; (6) Investment Securities; (7) Bank Stock as Collateral; (8) Loans to Officers and Directors; (9) Acquired Branches; (10) Travel Services; (11) Foreign Branches.

ARGUMENT

Since national banks no longer fall within the implied constitutional immunity doctrine by reason of the change in their banking functions, they are not immune from State or Local Sales and Use Taxes.

A. INTRODUCTORY

The scythe of time produces significant and fundamental changes, especially in the field of constitutional law. This, as this Court has found, compels sophisticated distinction, application, and often total isolation of past-decisional law. For those seeking the protective cloak of inter-governmental immunity, prior decisions must be reexamined and reevaluated in their historical setting and in view of the precise factual circumstances to which then existing principles were applied at the particular time. If not done, grievous misconstruction of prior cases occurs, since in this area, as in perhaps no other, this Court has admonished (*Oklahoma Tax Comm. v. Texas Co.*, 336 U. S. 342, 352, [1949]):²

"It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one.

² This case overruled five earlier cases involving the immunity doctrine, viz.: *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292 (1914); *Indian Oil Co. v. Oklahoma*, 240 U. S. 522 (1916); *Howard v. Gypsy Oil Co.*, 247 U. S. 503 (1918); *Large Oil Co. v. Howard*, 248 U. S. 549 (1919); *Oklahoma v. Barnsdall Corp.*, 296 U. S. 521 (1936).

"Our present problem lies on the constitutional level. It requires reconsideration of former decisions specifically in point, together with later ones deviating in rationale. It is of substantial importance both for the states' powers of taxation and for the subjects on which they may impinge."

It is for this reason, as we shall show, the case of *McCulloch v. Maryland*,³ 4 Wheat. 316 [1819], upon which appellant bottoms its claim to immunity from these non-discriminatory taxes, must be isolated in time and place for it has no modern application to them and grants no immunity.

This Court's restriction of the implied immunity doctrine has been pragmatic and deliberate in the past forty years, as its opinions clearly show. As with other constitutional doctrines it is not an absolute, and its severe limitation today stems, for reasons of comity, from a realistic awareness that the States must be accommodated by permitting them to enact revenue measures under their reserved tax powers to meet the rising costs of government. Consequently, all cases in this area must be construed and applied with extreme caution because, as this Court has also warned, they all require "the observing of close distinctions in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both

³ In *McCulloch*, the State of Maryland attempted to tax the operations of the Bank of the United States, while at the same time it exempted from the same tax State banks conducting their banking business within its borders. This, of course, was unconstitutional discrimination. Later, Ohio attempted this same tax discrimination and this, too, was similarly struck down in *Osborn v. Bank of the United States*, 22 U. S. 738 [1824], a case relied upon by respondent, as well. *McCulloch* involved an attempt by Maryland to impose a 2% tax upon circulating paper currency issued by the Bank of the United States; *Osborn* involved an attempt by Ohio to impose a tax of \$50,000 on each office of the Bank in the state. In both cases, state-chartered banks were specifically exempted from these taxes.

Nation and State under our dual system" (*James v. Dravo Contracting Co.*, 302 U. S. 134, 150 [1937]). Where, as here, there is no interference by these taxes with any jurisdiction asserted by the Federal Government, "the sovereign rights in this dual relationship are not antagonistic" (*Howard v. Commissioners*, 344 U. S. 624, 627 [1952]). Even where the United States itself claimed governmental immunity from State taxes on behalf of its lessees, for example, this Court stated "In this Court the trend has been to reject immunizing these private parties from non-discriminatory state taxes as a matter of constitutional law" (*United States v. City of Detroit*, 355 U. S. 466, 474 [1957]; see also *United States v. Township of Muskegon*, 355 U. S. 484; *City of Detroit v. Murray Corp.*, 355 U. S. 489).

It is for these reasons that this Court, from time to time, has consistently stated, for example, "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents" (*Penn Dairies v. Milk Control Comm.*, 318 U. S. 261, 270 [1942], emphasis added), i.e., it "should not be reversed" (*Oklahoma Tax Comm. v. United States*, 319 U. S. 598, 610 [1942]; ⁴ *Mayo v. United States*, 319 U. S. 441, 447 [1942]). This stems "as the result of experience and of observation of the constant widening of the exempting process from tax to tax to tax" (*Oklahoma Tax Comm. v. Texas Co.*, *supra*, 336 U. S. 342, 364-365). A trend⁵ not to extend such immunity is now so firmly estab-

⁴ This case, overruled an earlier immunity one, viz.: *Childers v. Beaver*, 270 U. S. 555 (1926).

⁵ Coincidentally, of course, this very same trend has occurred, and for the same reasons, as to the taxation of interstate and foreign

(Footnote continued on following page)

lished as to be beyond recall. This is why this Court, observing that, the former immunity exemption "process has been reversed in direction", and *carefully* noted that "True intergovernmental immunity remains for the most part" (*Texas Co., supra*, p. 365), nevertheless, stated it is not to be extended to *private* corporations or persons (*ibid.*, p. 365):

"* * * But, so far as concerns *private* persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption."

* * * (Emphasis added.)

Appellant's erroneous arguments concerning today's private national banks and the "nation's concerns," as it puts it, run squarely counter to this Court's decisions of the past thirty years in the areas of State sales and use taxation and the implied immunity doctrine.

(Footnote continued from preceding page)

commerce where former constitutional principles no longer apply because "it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of state government in return for the benefits it derives from within the State" (*Northwestern Cement Co. v. Minnesota*, 358 U. S. 450 [1958]; see also *Scripto v. Carson*, 362 U. S. 207 [1957]; *General Motors Corp. v. Washington*, 377 U. S. 436 [1963]). The reason being, as the Court said at the same term in which it decided *Northwestern, supra*, "the reconciliation of the competing demands of constitutional immunity and of the states' power to tax, is an extremely practical matter" (*Youngstown Co. v. Bowers*, 358 U. S. 534, 535). As to foreign commerce, an express immunity—not implied—see e.g., *Hooven & Allison Co. v. Evatt*, 324 U. S. 652 [1944]; *Atlantic Gulf & Pacific Co. v. Gerosa*, 16 N. Y. 2d 1 [1966], app. den. 382 U. S. 368; *Shell Oil Co. v. State Board*, 414 P. 2d 820 [1966]; app. den. 386 U. S. 211 [1967]).

I. National banks, privately-owned-profit-making corporations performing no unique governmental functions, must be treated no differently from state banks.

The historical change in the function of the national banks has destroyed any claim that they are now Federal instrumentalities so as to be presently immune from State and local sales and use taxes. The history of American Banking, for present purposes may be divided into three historical periods. Each has produced profound changes in banking functions which are of the utmost relevancy here (*Money*, M. L. Burstein 1963 Edition; *The Economics of Money and Banking*, Lester V. Chandler, Third Edition, 1959). The issues here involved will require a full understanding and consideration of the changes which occurred during these three periods, since such changes have destroyed all claim by national banks to constitutional immunity as Federal instrumentalities performing federal governmental functions.

These historical periods are: (1) the pre-Civil war period, 1782-1863; (2) the post-Civil war period, 1863-1913, and (3) 1913 to date.

The most profound change, having far-reaching ramifications upon the *currency* of the United States, occurred throughout the first two periods, and during the first part of the third. In a final analysis, the functions of national banks with respect to such *currency was the only justification for the immunity doctrine in the first place.*

Briefly, the effect upon the Nation's currency was brought about by reason of the change in the manner in which credit was extended by both State and Federal banks to their private customers through the issuance of bank notes. These respective bank notes were issued during the

first two periods and they circulated from hand to hand, and for the most part constituted the public's only means of monetary payment in satisfaction of obligations. This function, however, no longer exists today; since the means of extending credit to bank customers and the means of payment now consist almost entirely of bank deposits upon which checks are drawn, which circulate in lieu of currency, or of circulating notes issued by the Federal Reserve Banks.

The Three Periods in the Development of American Banking.

(1) The First Period, 1782-1863; McCulloch and Osborn Decisions.

It was during this period that the first bank in the United States, the Bank of North America, was established as a private banking institution in 1782, a few years before the Federal government was formed under the United States Constitution. In 1791, however, the First Bank of the United States was chartered by Congress as the "fiscal agent" of the United States and it existed until 1811. The Second Bank of the United States was chartered by Congress in 1816 and it continued until 1836 when, amid considerable public controversy between its president, Nicholas Biddle, and the President of the United States, Andrew Jackson, its charter expired. No such bank has ever been chartered since. It was this bank and its functions which were the subject of Chief Justice MARSHALL's opinions in *McCulloch v. Maryland*, 17 U. S. 316 (1819), and in *Osborn v. Bank of United States*, 22 U. S. 738 (1824). Appellant principally relies upon *McCulloch, supra*, to support its contention that it is a "federal instrumentality" constitutionally immune from the taxes here involved. It must be plain, however, that it has no present-day relevancy nor

application to it or to the issues involved in this proceeding. Its relevancy in the instant case is only to point out, in sharp contrast, its total inapplication. Both these cited cases involved attempts by two different states to impose discriminatory taxes upon a partly government-owned bank performing vital governmental functions, *none of which are now performed by national banks.*

In *McCulloch* and *Osborn*, the States of Maryland and Ohio respectively, attempted to tax the operations of the Bank of the United States, while at the same time they exempted from the same tax State chartered banks conducting their banking business within the borders of those respective States. Clearly cases of unconstitutional discrimination.

The taxes there in question appear not to have been revenue measures, so much as political measures specifically designed to make it difficult for the Bank of the United States to operate. *McCulloch* involved an attempt by Maryland to impose a 2% tax upon circulating paper currency issued by the Bank of the United States; *Osborn* involved an attempt by Ohio to impose a tax of \$50,000 on each office of the Bank in the state. In both cases, state-chartered banks are specifically exempted from these taxes.

In striking down this discriminatory legislation, Chief Justice MARSHALL specifically recognized that states could impose nondiscriminatory taxes on the property of the Bank, saying (17 U. S. at 436):

"This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in

common with other property of the same description throughout the state."

The Bank of the United States, which the *McCulloch* and *Osborn* decisions involved, was no mere private business corporation, like the national banks of today. Instead, it was a partly government-owned central bank, performing vital governmental functions. The degree of the Federal Government's involvement in the operations of the Bank of the United States is illustrated by the following facts:

- (1) The Federal Government subscribed to and owned 20% of the capital stock of the Bank, with the remaining stock held by private persons. The President of the United States had the power to appoint five of the twenty-five members of the board of directors of the Bank (in addition to the Federal Government's right, as a stockholder, to participate in elections of the Bank's remaining directors).
- (2) The Secretary of the Treasury of the United States was required to deposit all public money of the Federal government in the Bank, or if he did not do so, was required to report his reasons for not doing so to Congress.
- (3) The Bank was required to transmit funds for the Federal government without charge.
- (4) Circulating paper currency issued by the Bank was made legal tender for payment of all debts owing to the Federal government; furthermore, where debts to the Federal government were paid in circulating paper currency issued by State-chartered banks, the Bank of the United States collected these notes in specie from the issuing institutions.

- (5) The Bank acted as fiscal agent for the United States and handled its foreign exchange transactions.⁶

Chief Justice MARSHALL, in concluding in *McCulloch* and *Osborn* that the taxes attempted to be imposed on the Bank by Maryland and Ohio were unconstitutional, stated that the Bank of the United States was an "instrumentality" of the Federal government. This statement, however, was not based on the mere fact that the Bank was chartered by the United States, *but rather was based upon an analysis of its actual governmental functions.*⁷ Thus, in the *Osborn* decision, Chief Justice MARSHALL, pointed out that the Bank was "the great instrument by which the *fiscal operations of the government are effected*" (22 U. S. at 860), and that:

*"We do not maintain that the corporate character of the bank exempts its operations from the action of state authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. *** The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government."* (22 U. S. at 862-3, emphasis supplied.)

"If the trade of the bank be essential to its character as a machine for the fiscal operations of the government, that trade must be as exempt from the state control as the actual conveyance of the public money." (22 U. S. at 867, emphasis supplied.)

⁶ Source: *Financial History of the United States*, Studenski and Kroos (McGraw-Hill, 1952), pp. 83-88, 103-106.

⁷ See also a more detailed discussion under III, *infra*.

(2) *The post-Civil War Period, 1863-1913; Owensboro Decision, etc.*

Largely to finance the Civil War and to protect the currency, Congress enacted the National Bank Acts of 1863 and 1864. The National Bank Act of 1864 was significantly entitled "An Act to Provide a National Currency, Secured by a Pledge of United States Bond and to provide for the Circulation and Redemption thereof". For a detailed discussion of the reasons prompting the enactment of this Act, see *Banking Studies*, 1941, pp. 10-12, 41-46, published by the Board of Governors of the Federal Reserve System.

This act, in large measure, provided for the circulation of the nation's paper currency, and made such currency legal tender for all debts owing to the Federal government or payable by it. To insure the protection of such currency against insolvency of the issuing bank, each bank was required to secure its currency by depositing United States bonds with the Treasury Department; to protect against forgery and over-issuance, this currency was printed for issuing banks by the Treasury Department. On the other hand, however, state banks were effectively forced out of the business of issuing their own bank notes by the imposition of a Federal tax of ten per cent of the principal amount of their bank notes under a statute which was designed to give national banks a monopoly in this particular area (13 Stat. 484 [1865], carried over into the Internal Revenue Code, present Code § 4881, subd. b). The constitutionality of this Federal tax imposition was sustained in *Veazie Bank v. Fenn*, 75 U.S. 533 (1869).

Indeed, we submit that the very enactment of this 1864 Act was significantly portentous. The Act itself marked a radical departure from and was an historic exception to the

implied immunity doctrine which since has been even more vastly curtailed in its present day application by both the Congress and by this Court, as shown herein. This Act was the first Congressional recognition that even privately owned national banks, thereby authorized and which were to function for a time thereunder, were not to be fully protected by the immunity doctrine, in any event, despite its existence. This is made quite clear by the Congressional authorization to permit their taxation by the States at the very same time they were to be subjected to Federal taxation also (13 Stat. [1864], ch. 106, § 41, pp. 111-112). A fair reading of the Congressional debates in their entirety, construed out of context by the appellant, shows that the Congress was concerned essentially with the taxation of true "instruments" of the United States government, *as they then existed*, especially as to the effect upon the Nation's currency, which, of course, prompted enactment of the Act in the first place. Despite this concern, however, State taxation was permitted because the authorized taxes were not upon the bank's *operations*, as was the case in *McCulloch v. Maryland*, *supra*, (see e.g., *Cong. Globe*, 38th Cong., 1st Sess., Vol. 34, Part 2, pp. 1890 *et seq.*). It is for this reason that cases like *Bank of California v. Richardson*, 248 U. S. 476 [1919], and similar ones, also erroneously cited by appellant, are wholly distinguished and inapplicable here. As the *Richardson* opinion notes, for example, the State tax struck down there was because it impaired the bank's *operations*. (*ibid.*, p. 483). Such is not the case here (see also, pp. 19-20, 50, 52-55 herein).

Isolated in time and place, as are *McCulloch* and *Osborn*, is the decision in *Owensboro National Bank v. Owensboro*, 173 U. S. 664 (1899), decided during the second period, upon which appellant also unjustifiably relies. This case,

too, was decided at a time when national banks were actively engaged in performing the essential "governmental" function of issuing their own bank notes which served as the Nation's currency, a situation no longer existing today. At that time, this Court quite properly ruled in the *Owensboro* case, that a State tax imposed upon intangible property could not be applied to a national bank. We must point out, however, that there was no attempt made therein as is the case now, to determine whether such banks as they then existed actually performed any governmental function. Consequently, as the opinion clearly shows, the language from *McCulloch* and *Osborn* cases, *supra*, was merely applied mechanically, which in substance was to the effect that the original Bank of the United States was a "Federal instrumentality", which, of course, it was, as previously shown. There was no attempt made to analyze the functions of national banks at the period of the *Owensboro* litigation to determine whether they were in any way similar in organization, ownership or operation to that of the original Bank of the United States. But even if there had been such an analysis, the functions of present-day national banks are completely different from those in 1899, since they no longer perform the unique "governmental" function of issuing circulating bank notes.

Although the *Owensboro* decision has been cited from time to time by subsequent cases decided by this Court, the later cases merely contain *obiter dicta*, to the effect that national banks were Federal instrumentalities. While either rejecting or upholding the taxes involved on national banks, the cases made no attempt to analyze the bank-operations of national banks as "governmental" functions (see e.g. *First National Bank v. Anderson*, 269 U. S. 341

[1926]; *First National Bank v. Hartford*, 273 U. S. 548 [1927]; *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239 [1931]; *Colorado National Bank v. Bedford*, 310 U. S. 41 [1940]; *People ex rel. Bridgeport Savings Bank v. Feitner*, 191 N. Y. 88 [1908]).

None of these cases was decided on Constitutional grounds. All except one involved a tax on national bank shares, specifically mentioned in § 548 of the National Bank Act⁸ (12 U. S. C. A.), and rested upon that provision, which is not relevant nor applicable here. The sole exception was the case of *Colorado Bank v. Bedford*, 310 U. S. 41, *supra*, a case which, indeed, is perfectly consistent with our position, in any event, as we will show, *infra*, p. 52.

We emphasize once again that the *Owensboro* case, *supra*, was decided during the second banking period when national banks were still performing Federal governmental functions. At the same time and during this very period, in 1873, however, this Court squarely held that the mere fact that a private business corporation is Federally chartered does not immunize it from non-discriminatory State taxation which does not interfere with an essential governmental function performed for the Federal government (*Union Pacific R. R. Co. v. Penniston*, 85 U. S. 5 [1873])⁹. This Court ruled in that case that a private railroad corporation operating under a Federal charter and performing certain services for the Federal government, such as carrying the mails, is not constitutionally immune from a non-discriminatory State property tax. This Court specifically rejected the railroad's argument that its Federal charter conferred immunity from State taxation (*ibid.* pp. 33-34):

⁸ § 548 is reproduced as Appendix A hereto.

⁹ See also a more detailed discussion under III, *infra*.

"It is, however, insisted that the case of [a state-chartered railroad which had previously been held by the Court to be subject to state taxation] differs from the case we have now in hand in the fact that it was incorporated by the *** legislature of the state of Kansas, while these complainants were incorporated by Congress. We do not perceive that this presents any reason for the application of a rule different from that which was applied in the former case. *** The United States have no more ownership of the road, authorized by Congress than they had in the road authorized by Kansas."

The national banks today fall into this same category, and this Court no longer regards "private persons or firms" which perform various services for and on behalf of the Federal government as immune from non-discriminatory State taxation.

It is clear, therefore, as we urge, that the mere mechanism of Federal chartering does not envelope private business corporations, such as national banks, with the implied immunity doctrine. Quite the contrary, the historical development of this judicial doctrine clearly demonstrates that it is invoked solely: (1) where actual governmental functions are involved, and, (2) where those functions have been unduly interfered with. This was made abundantly clear by this Court when, for example, in analyzing the cases of *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank*, 22 U. S. 737; *Union Pacific Railroad Co. v. Peniston*, 18 Wall. 5; *California v. Central Pac. R. R. Co.*, 127 U. S. 1, it stated (*Flint v. Stone Tracy Co.*, 220 U. S. 107, 152 [1910]):

"An examination of these cases will show that in each case where the tax was held invalid the decision rested upon the proposition that the corporation was created to carry into effect powers conferred upon the Federal government in its sovereign capacity, and the

attempted taxation was an interference with the effectual exercise of such powers."

Later cases, of course, clearly re-affirm this distinction. We point out that the sales taxes imposed by the State of New York are certainly not imposed upon any banking function or any operation, in any event; they are imposed solely upon private business "retail sales transactions" (New York Tax Law § 1105; Erie County [New York] Sales Tax Law § 2[a]).

We respectfully submit that appellant fails to recognize the fundamental and valid distinction existing between *private* business corporations, such as national banks, created under permissive Federal legislation and engaged in private business, on the one hand, and, on the other hand, those actual Federal fiscal agencies *created* by Congress by specific legislation to perform Federal functions, such as those fiscal agencies itemized herein. Because of this distinction, as the cases clearly show, the implied immunity doctrine may afford tax exemption to this latter group; whereas the doctrine is inapplicable to the former. This has been so ever since the decision in *Osborn v. U. S. Bank*, 22 U. S. 737, 858, *supra* (see also, e.g., *Union Pacific Railroad Co. v. Peniston*, *supra*, 85 U. S. 5 [1873]; *Susquehanna Co. v. Tax Commission*, 203 U. S. 291, 294 [1930]; and *Union Bank and Trust Co. v. Phelps*, 288 U. S. 176, 180-181 [1932]).

(3) *The Third Banking Period, 1913 to the present.*

a. *Changes in Banking Functions of National Banks.*

From the end of the Civil War to the first decade of the Twentieth Century, national bank notes, along with "green-back currency" issued directly by the Treasury Depart-

ment, were the principal paper currency which circulated in the United States. However, recurring monetary crises, largely resulting from the inflexibility of national bank currency, prompted the formation of the Federal Reserve System in 1914 (12 U. S. C. A. § 221, *et seq.*), and shortly thereafter that system became the principal issuer of paper currency.¹⁰

The Federal Reserve System was created by Public Law, No. 43, 38 Stat. 251, 66 Cong. 21 sess. (Title 12 U. S. C. A., § 221, *et seq.*), and its preamble significantly states "An Act to provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes."

The System's relationship to circulating currency is far more important in American banking than is that of commercial banks, since, for example, its responsibilities govern national monetary and credit conditions: "The Federal Reserve Banks are the only banking institutions in the United States that can *issue currency*. Commercial banks can release existing currency for circulation but they cannot create a new supply." (*Banking Studies*, 1941, p. 240, *supra*. That is, the Federal Reserve

¹⁰ The inflexibility of national bank currency arose because bank notes issued by national banks had to be secured by governmental bonds. As a result such banks were inclined to reduce the amount of their currency in circulation during periods of tight money, when investing in government bonds became less profitable than making loans, and, conversely, to increase their bank note circulation in periods of plentiful credit, when government bonds became the desirable investment. The effect of this was to reduce the supply of money in periods of tight credit, when it was needed most, and to increase the supply of money in periods of plentiful credit, when it was needed least.

System "can draw upon a power no commercial bank can exercise. This is the power to create money in the form of either currency or bank deposits" (*ibid.* pp. 239-240). Consequently, this System is a "true instrumentality" of the United States which is superimposed upon the banking system of the United States, superseding the national banks, and is more akin to the old Bank of the United States, *supra*, for purposes here, since Federal Reserve Banks are designated as "Government depositaries and fiscal agents" (Title 12, *supra*, § 391). For these reasons, among others, Congress specifically immunized these banks from taxation: "Federal reserve banks, including the capital stock and surplus thereon and the income derived therefrom, shall be exempt from Federal, State, and local taxation, except taxes upon real estate" (Title 12, *supra*, § 531). Unlike national banks, the *public* interest and not *private gain* is the purpose of operation of Federal Reserve Banks (*Banking Studies, supra*, pp. 231-233).¹¹

The year 1935, is the cutoff date for the circulation of national bank currency, and is decisive in answer to appellant's "Federal Instrumentality" argument. For a long time prior thereto, national banks had failed to issue their circulating notes to the full amount permitted by the volume of Federal bonds authorizing and securing such notes, and on August 1, 1935, the last of the Federal bonds securing the privilege were retired. Upon the retirement of these bonds, national banks deposited sufficient funds with the Treasury Department to cover their outstanding notes and that department assumed liability for them. Any outstanding

¹¹ For an authoritative discussion of the functions of the Federal Reserve System as displacing the former functions of national banks, the Court is referred to *Banking Studies, 1941, supra*, and to *The Federal Reserve System, Purposes and Functions, 1963*, also published by the Board of Governors of that system.

notes are now being cancelled as rapidly as they are received and only a very small portion is outstanding at the present time (See *Financial History of the United States*, Studenski and Kroos, 1952, p. 393).¹²

The original reason for the application of the immunity doctrine to national banks terminated when this radical change in their currency function occurred. The relationship of national banks to the Federal government since that time is no different from that of State banks which belong to the Federal Reserve System, a regulatory relationship and both these banks are subject to the taxes here involved.

Unlike Federally chartered *public corporations* owned and operated by the government, national banks like their State counterparts, are privately owned, managed and operated for profit as business corporations engaged in the highly competitive banking field, the profits of which in both cases inure to the banks and to their stockholders—not to any government. The principal business of both types of banks is to accept deposits, to make various loans to their private customers, and to make their own invest-

¹² Circulating notes of national banks upon deposit of United States bonds was authorized by Title 12 U. S. C. A. §§ 101, 101a. The annotation to § 101a states:

"Redemption of Bonds. In a communication from the Treasury Department dated February 17, 1941, it was stated: 'The Secretary of the Treasury called for redemption of the only outstanding issues of United States bonds bearing the circulation privilege as follows:

'2% Consols. of 1930, as of July 1, 1935. . . .

'2% Panama Canal bonds of 1916-36.

and

'2% Panama Canal bonds of 1918-39, as of August 1, 1935.'

"The retirement of these issues automatically put an end to the National Bank note circulation and the collection of the tax thereon."

For the reasons for the redemption of the bonds, see *Banking Studies, supra*, pp. 12, 308.

ments, restricted only by their respective regulatory statutes (i.e., the National Banking Act, *supra*, and the New York State Banking Law). We point out, however, that these regulatory and supervisory statutes do not determine taxability. It is for this reason, therefore, that cases involving supervision of banks, by the Federal government in this area have absolutely no relevancy here (see e.g., *Advertising, Franklin National Bank v. New York*, 347 U. S. 373 [1953]; *Venue for litigation, Mercantile National Bank v. Langdeau*, 371 U. S. 555 [1962]; *United States v. Philadelphia Nat. Bank*, 374 U. S. 321, 330 [1962]; branch banking; *First Nat. Bank v. Walker Bank*, 385 U. S. 252 [1966]; *United States v. Third National Bank*, decided March 4, 1968, No. 86, Oct. Term, 1967). On the other hand, however this Court has consistently held that State law is applicable to national banks unless it *infringes* upon the National Banking Law, the banking laws of the several States, the Federal Deposit Insurance Act, or the Federal Reserve Act; or imposes an undue burden on the performance of their functions (see e.g., *First National Bank v. Kentucky*, 76 U. S. 353 [1870]; *McClellan v. Chipman*, 164 U. S. 347 [1896]; *First National Bank v. Missouri*, 263 U. S. 640 [1924]; *Anderson National Bank v. Luckett*, 321 U. S. 233 [1944]). Of course, the sales and use tax statutes involved herein obviously do not regulate or supervise national banks, nor are they discriminatory or arbitrary.

Because national banks are *private* corporations, Congress has provided innumerable instances for competitive equality between national and state banks. One of the historically dominant concepts of the Federal banking laws is to place national—and State banks on an equal footing in all important areas of competitive banking. Had Congress considered the question in 1864 or 1926, it is unlikely,

in view of this policy that it would have discriminated against State banks by exempting national banks from State sales and use taxes. Illustrative of the policy of maintaining the competitive equality of national and State banks is the fact that the National Bank Act expressly provides that national banks are subject to the restrictions of State law applicable to State banks with respect to establishment of branch offices (12 U. S. C. § 36), fiduciary powers (12 U. S. C. § 92a), maximum interest rates on savings and time deposits (12 U. S. C. § 371). Conversely, the Federal Reserve Act provides that State banks which are members of the Federal Reserve System are subject to the same restrictions as national banks with respect to investing in and underwriting securities (12 U. S. C. § 335).

The entire history of American banking has been one for competitive equality within the banking system of the United States in the services rendered by both national banks and State banks so that neither would be at a competitive disadvantage with the others. This concept would be destroyed if Appellant prevails. The competitive equality of national and State banks is specifically recognized by the National Banking Act which provides, for example, that State as well as national banks which are members of the Federal Reserve System may accept deposits of public monies of the United States government and its agencies (Title 12 U. S. C. A. § 265). Moreover, the Treasury Department and other Federal agencies are specifically enjoined by the same statute from discriminating in favor of national banks over State banks in their selection as depositories of public monies, as follows (*ibid.*, § 265):

“Notwithstanding any other provision of law, no department, board, agency, instrumentality, officer, employee, or agent of the United States shall”:

1. "issue or permit to continue in effect any regulations, rulings, or instructions or"
2. "enter into or approve any contracts or"
3. "perform any other acts having to do with the deposit, disbursement or expenditure of public funds, or"
4. "the deposit, custody, or"
5. "advance of funds subject to the control of the United States as trustee or"
6. "otherwise which shall discriminate against or prefer national banking associations, State bank members of the Federal Reserve System, or insured banks not members of the Federal Reserve System, by class, or which shall require those enjoying the benefits, directly or indirectly, of disbursed public funds so to discriminate."

The United States Treasury Department customarily keeps its revenues from taxes and bond issues, which are deposited in so-called "Tax and Loan Accounts", in both national and State banks until the funds are needed for governmental expenditure. As of June 30, 1965, for example, the Federal government's deposits in commercial banks in New York State totalled about three billion dollars, with six hundred seventy-seven million dollars deposited in national banks, as compared with *two billion three hundred million dollars in state banks* (Federal Deposit Insurance Corporation, "Assets, Liabilities and Capital Accounts, Commercial and Mutual Savings Banks," June 30, 1965). Equality is also achieved between State and national banks by Congressional authorization that both may underwrite the obligations of independent Federal agencies, such as the Federal Mortgage Association, and Federal Home Loan Banks (12 U. S. C. A., §§ 24, 335), and both actively compete, for example, for business engendered by the Federal Housing and Veteran Administra-

tions' loans. This concept for equality works both ways and it is for this reason that Congress, as its committee reports show, enacted in 1964 Public Law 88-341, 78 Stat. 233 (amending the Federal Reserve Act, 12 U. S. C. 37, § 371) to permit national banks to make real estate loans on certain forest tracts because: "State banks in at least two-thirds of the States operate under a more liberal statutory framework than do national banks in the area of loans on forest tracts and in more than one-third of the States there are no statutory restrictions at all. National banks should be permitted to act more effectively in this field and help meet the credit needs of the timber industry" (see 1964 *U. S. Code Cong. & Admin. News*, Vol. 2, p. 2305).

For the most recent judicial discussion of this concept of competitive equality see *First Nat. Bank v. Walker Bank*, 385 U. S. 252, 261 (1966).

Because State and national banks are similiar and perform essentially similar banking functions, both the State and national banking laws provide for each respective bank to convert from one to the other with comparative ease (such as the New York State Banking Law, §§ 136, 137; 12 U. S. C. A. 12, § 35). The Liberty National Bank, for example, converted from State to national banking status in 1963. Surely this mere act of conversion should not be the determinate for tax immunity. (See, e.g., *Union Pacific Railroad Co. v. Peniston*, 85 U. S. 5 [1873], and p. 18, *supra*.)

At the same time the Congress was assuring competitive equality between State and national banks, it also provided that both types of banks were to be treated no differently from other business corporations. National banks, like State chartered banks, are subject to; *Federal taxation* (1954 Internal Revenue Code, §§ 581 *et seq.*). (The Federal Reserve Banks are not. [12 U. S. C. A.,

§ 531]). National banks like State banks are subject to the Federal *anti-trust laws* (Sherman Act, 15 U. S. C. A. § 4, and Clayton Act, 15 U. S. C. A. § 15; cf. *United States v. Philadelphia National Bank*, 374 U. S. 321 [1962]; *United States v. First National Bank*, 376 U. S. 665 [1963]) *United States v. Third National Bank*, decided March 4, 1968, *supra*; No. 86, Oct. Term, 1967; to *labor laws* (National Labor Relations Act, 29 U. S. C. A.; *N. L. R. B. v. Bank of America*, 130 F. 2d 624 [C. C. A. 9]); to *securities laws* (1964 Securities Acts Amendments, 78 Stat. 568, amending many provisions of 15 U. S. C. A.) as well as any other Federal regulatory provisions.

In the *Bank of America* case, *supra*, the United States Court of Appeals squarely rejected the national bank's contention that as a "Federal instrumentality" it was exempt from the National Labor Relations Act (130 F. 2d 624, 627):

"It is a privately owned corporation, privately managed and operated in the interest of its stockholders. *United States Shipping Board Emergency Fleet Corporation v. Western Union Telegraph Co.*, 275 U. S. 415, 416, 425, 48 S. Ct. 198, 72 L. Ed. 345. The United States did not create it, but has merely enabled it to be created. True, national banks are subject to strict regulation and supervision but so are a host of other private enterprises. It is true, also, that national banks may at times be called upon as aids in carrying out the fiscal policies of the government, but their activities in these respects are occasional and incidental to the primary purpose of the individuals who organize them."

b. *Congressional Acts Changing National Bank Status.*

Any thorough analysis of national banks, as they presently function, must involve a comparison between the abolition by Congress of their former governmental functions,

on the one hand, with the coincidental creation by Congress of numerous governmental agencies and corporations, which also operate within the framework of the banking system as an integral part thereof, and which effectuate the monetary and fiscal policies of the Federal government. These latter agencies and corporations are designated as "Federal agencies and instrumentalities" by specific acts of Congress and, of course, the doctrine of implied constitutional immunity certainly applies to them. Under the Government Corporation Control Act of 1945 (Public Law 248, 79th Congress, 31 U. S. Code 841), the Federal Government was reorganized for purposes of economy and efficiency in carrying out the various functions of the Federal government (For the legislative history of these reorganization acts, see U. S. Code Congressional Service, 1945, pp. 887-907; *ibid.* 1949, pp. 1381-1394). Further reorganization occurred with a subsequent Congressional act in 1949 (63 Stat. 203) and has been extended by subsequent acts in 1953, 1955, 1957, 1961, and 1964. Section 7 of the 1949 act defines the term "agencies" as meaning "any executive department, commission, counsel, independent establishment, government corporation, board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the government." Nowhere in these reorganization acts is there any reference to or inclusion of national banks, although a long list of wholly owned government corporations were listed in the Senate Committee Report (1945 U. S. Code Congressional Service, *supra*, pp. 891-892). They are listed below.¹³

¹³ Cargoes, Incorporated;
Commodity Credit Corporation;
Defense Homes Corporation;
Defense Plant Corporation;
Defense Supplies Corporation;

Section 201 of the act defined the "mixed-ownership" government corporations and included the following:

Banks for Cooperatives (1 central and 12 regional banks)
 Federal Deposit Insurance Corporation
 Federal Home Loan Banks (12 banks),
 Federal Intermediate Credit Banks
 Federal Land Banks (12 banks)

(Footnote continued from preceding page)

Disaster Loan Corporation;
 Export-Import Bank of Washington;
 Farmers' Home Corporation;
 Federal Crop Insurance Corporation;
 Federal Farm Mortgage Corporation;
 Federal Housing Administration;
 Federal National Mortgage Association;
 Federal Prison Industries, Incorporated;
 Federal Public Housing Authority,
 (or United States Housing Authority);
 Federal Savings and Loan Insurance Corporation;
 Federal Surplus Commodities Corporation,
 Home Owners' Loan Corporation;
 Inland Waterways Corporation;
 Institute of Inter-American Affairs;
 Institute of Inter-American Transportation;
 Inter-American Educational Foundation Incorporated;
 Inter-American Navigation Corporation;
 Metals Reserve Company;
 Panama Canal Company;
 Petroleum Reserves Corporation;
 Prencinradio, Incorporated;
 Reconstruction Finance Corporation;
 RFC Mortgage Company;
 Regional Agricultural Credit Corporations;
 Rubber Development Corporation;
 Rubber Reserve Company;
 Saint Lawrence Seaway Development Corporation;
 Smaller War Plants Corporation;
 Tennessee Valley Associated Cooperatives Incorporated;
 Tennessee Valley Authority;
 United States Commercial Company;
 United States Housing Authority;
 United States Housing Corporation;
 United States Spruce Production Corporation;
 Virgin Islands Corporation;
 War Damage Corporation;
 Warrior River Terminal Company.

Elsewhere the act provided that no government corporation can be created to act as an *agency or instrumentality* of the United States except by or pursuant to congressional action (§ 304), and all government corporations now operating under state charters were required to institute dissolution or liquidation proceedings on or before June 30, 1948, subject to re-incorporation by act of Congress (§ 304[b]). The 1949 act, unlike its predecessors, did not exempt a single agency of the executive branch from its scope, clearly showing its universal application. (The 1945 act had exempted such agencies as the Securities and Exchange Commission, the Federal Deposit Insurance Corporation and the Veterans Administration.)

Clearly, therefore, this is a clear-cut recognition by the Congress that national banks no longer can be classified as Federal instrumentalities.

II. National banks are not entitled to constitutional immunity from non-discriminatory sales taxation.

While these far-reaching Congressional changes concerning the functions of national banks described, *supra*, there were also epochal changes occurring in the decisions of this Court in the field of implied constitutional immunity. This judicial re-appraisal and restriction of the immunity doctrine warrants a brief re-emphasis because Congress, despite this change, has failed to respond in turn by immunizing national banks from non-discriminatory sales taxes of the kind involved. This inaction by Congress can only be construed as tacit approval to permit the States to act in this area of taxation, despite Appellant's erroneous views to the contrary.

At the time of the *Owensboro* decision (173 U. S. 664 [1898]), *supra*, this Court had adopted and applied the

general immunity doctrine that States could not, except to the extent specifically authorized by Congress, tax private persons or firms performing services for the Federal government. Not only were national banks regarded as constitutionally immune from State taxation, but so were: (1) Federal employees, *Dobbins v. Commissioners*, 41 U. S. 435 (1842); (2) private companies dealing with Indian lands, *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292 (1914); and (3) contractors dealing with the Federal government (*Panhandle Oil Co. v. Mississippi*, 277 U. S. 218 [1928]). The rationale of these cases was to carry to its extreme conclusion the famous dictum in the *McCulloch* decision that "the power to tax involves the power to destroy". In other words, this Court denied the States the power to levy even non-discriminatory taxes on individuals or firms performing services for the Federal government upon the theory that the States might conceivably exercise their taxing powers so as to interfere with the performance of those services. These persons were considered to be the "instrumentality" through which the government carried out its functions and, consequently, " * * * the salary or compensation for the service of the officer is inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt." (*The Collector v. Day*, 78 U. S. 113, 123 [1870].)

However, beginning in the late '30's this Court found that such doctrine was no longer appropriate and overruled it as inapplicable to: Federal employees (*Graves v. New York*, 306 U. S. 466 [1939]); private contractors dealing with the Federal government (see e.g., *Alabama v. King & Boozer*, 314 U. S. 1 [1942]; *United States v. Detroit*, 355 U. S. 466 [1957]; *United States v. Muskegon*, 355 U. S. 484 [1957]; *Detroit v. Murray Corp.*, 355 U. S.

489 [1957]; *United States v. Boyd*, 378 U. S. 39 [1964]; to those leasing Indian lands. *Oklahoma Tax Comm. v. The Texas Co.*, 336 U. S. 342 [1948]).

In his concurring opinion in the *Grave* case, *supra*, Mr. Justice FRANKFURTER referred to the earlier immunity doctrine as involving "sterile refinements unrelated to affairs" and pragmatically concluded (306 U. S. 490):

"*** The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice HOLMES' pen: 'The power to tax is not the power to destroy while this Court sits.' *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism,* and this, too, when the financial needs of all governments began steadily to mount." [footnote omitted.]

This Court, as we have shown, has made it perfectly clear that it was overruling the earlier doctrine in its entirety rather than in its application to particular factual situations. For example, in the case of private contractors with the Federal government, as to whom non-discriminatory taxes have been sustained in the face of asserted constitutional immunity, this Court has stated (*United States v. Detroit*, *supra*, 355 U. S. 466, 474):

"Today the United States does business with a vast number of private parties. In this Court the trend has been to reject immunizing these private parties from nondiscriminatory state taxes as a matter of constitutional law."

And, in *United States v. Muskegon*, 355 U. S. 484, *supra*, this Court found a marked distinction between *private*

business firms performing services for the Federal government, on the one hand, which are subject to non-discriminatory State taxes, and those corporations actually *owned or controlled* by the Federal government, on the other which are true Federal "instrumentalities" and possess implied constitutional immunity. There, it was stated (355 U. S. 486):

"The case might well be different if the government had reserved such control over the activities and financial gain of [the contractor] that it would properly be called a 'servant' of the United States in agency terms. But here [the contractor] was not so assimilated by the government as to become one of its constituent parts. It was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them." (Emphasis supplied.)

At its last term, however, this Court upheld the constitutional immunity of the American Red Cross from the Unemployment Tax of the State of Colorado (*Department of Employment v. United States*, 358 U. S. 355 [1966]). A detailed examination of the factors impelling the decision therein clearly shows that national banks, on the other hand, as presently functioning, no longer possess implied constitutional immunity from the taxes involved here. In the *Employment* case, *supra*, it was stated (pp. 359-360):

"Congress chartered the present Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit by the Defense, then War, Department. 33 Stat. 599, as amended, 36 U. S. C. § 1 *et seq.* Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors. 33 Stat. 601, as amended, 36 U. S. C. § 5. By statute and Executive Order there devolved upon the Red Cross the right and the obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our

Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government."

In sharp contrast, as the New York Court of Appeals concluded, national banks today certainly do not function as "an arm of the government", (*cf.* also *Standard Oil Co. v. Johnson*, 316 U. S. 481, 485 [1941]), and that Court found that national banks presently lack every essential element which immunizes the Red Cross. The opinion of the New York Court of Appeals distinguished national banks, as follows (Appendix B, 71-74):

"The reasoning of the second case relied on by the bank clearly supports our conclusion regarding the status of national banks. In *Department of Employment v. United States* (*supra*) the court held that the American National Red Cross was a tax-immune instrumentality of the Federal Government. The court's analysis is significant and instructive. Mr. Justice FORTAS, speaking for the court, wrote (385 U. S., *supra*, pp. 358-360): 'Although there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality, the Red Cross is clearly such an instrumentality * * * Congress chartered the Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit * * * Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors * * * By statute and Executive Order there developed upon the Red Cross the right and obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of

our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status as an arm of the Government.'

The contrast between activities and functions of the American National Red Cross and that of the Liberty National Bank and Trust Company is so striking that no further elaboration is required.

We must note, however, as the bank points out, that there is dictum in the Red Cross opinion which supports its contention on this appeal. Thus the court wrote (p. 360): 'In those respects in which the Red Cross differs from the usual government agency—e.g., in that its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—e.g., national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute.'

If the Supreme Court had dealt with the precise problem with which we are concerned here—namely the status of national banks—we would, of course, follow that decision without question. We believe that the court's reference to national banks is clearly understandable in the context in which it was rendered, since the precedents cited and discussed earlier have never been rejected and the status of national banks as tax-immune instrumentalities was not disputed in that case. It is obvious, however, that the *reasoning* of the court's decision and its holding squarely support the position we take here and the similar position recently taken by the Supreme Judicial Court of Massachusetts (*First Agric. Nat. Bank of Berkshire County v. State Tax Comm.*, 229 N. E. 2d 245 [Mass., 1967]). Until the Supreme Court holds that *national banks of today* are to be deemed immune from contributing their fair share of the taxes necessary to enable State and local

governments to provide the essential services from which the banks themselves benefit, we decline to do so.

We, of course, recognize that, even though the bank is not automatically entitled to a constitutional immunity from taxation, Congress has the power to immunize national banks and other federally chartered institutions from this type of taxation. There is, however, no such statute presently in effect."

We submit that if the dictum in the *Red Cross* opinion, *supra*, concerning tax immunity has any relevance to the precise issue here this dictum must be construed, as we contend and demonstrate herein, solely in reference to the *other* taxes mentioned in § 548, *supra*, and certainly not to State sales taxes which are otherwise permitted by the Federal Constitution and which never have been denied to the States by a specific act of Congress. We further submit that the *Red Cross* opinion, *supra*, must be construed with the one rendered the same date by this Court in *First National Bank v. Walker Bank*, 385 U. S. 252, in which the *McCulloch* case was also cited, to show that the original Bank of the United States was, as it then existed, a "true" federal instrumentality. The *Walker Bank* case, *supra*, of course, was concerned solely with Congressional regulatory power over branch banking of national banks, an area in which Congress has pre-emptive jurisdiction for purposes of regulation. As shown herein, this is an entirely different matter from that of taxation.

III. National banks have no statutory immunity from non-discriminatory sales taxation.

Section 548 of U. S. C. A., *supra*, is not the sole measure for taxing national banks. All that can be said about appellant's legislative history of this section is that Congress has deemed it unnecessary to amend it. It is very clear that the specific provisions of § 548 do not prohibit

states from imposing a sales or use tax which may be paid by national banks. While the statute expressly mentions four specified types of taxes (on shares, on dividends, on income of the bank, and taxes "measured by" the income of the bank) and does not mention sales or use taxes, it very definitely does not provide that these four are the *only* permissible kinds of taxes to the exclusion of all others, as we have already shown. Subdivision 1 of Section 548 merely provides that "the imposition by any State of any one of the above forms of taxation shall be *in lieu of the others*" therein enumerated (emphasis added). This addition was made in 1923 (42 Stat. 1499; Public Law No. 518, Ch. 267), as its legislative history shows, solely for the purposes of extending the competitive equality concept contained in the National Banking Act (see *Senate Reports*, Vol. I, Rept. No. 986, 67th Cong. 1922-1923, pp. 1-4. *House Reports*, Vol. III, Rept. No. 1078, 67th Cong., 1922-1923, pp. 1-2). This addition was to prevent a national bank or its shareholders from being subjected to more than one of *the four* enumerated types of taxes, other than real property taxes, so as to avoid multiple taxation of the same income. Subdivision 1(a) of § 548 uses the phrase "the others", thus clearly referring to the *other* enumerated types of taxes. It does not provide nor mean, as appellant would have it, that the imposition of any one of these four forms of taxes shall be *in lieu of all other different taxes*, such as a non-discriminatory sales tax. This was never the Congressional intent, nor has it ever been so construed by this Court.

Appellant argues that Congress, by mentioning some form of taxation in § 548, *supra*, intended to prohibit *all* other forms of taxation. This contention is wholly without merit, especially in this field. Immunity cannot be derived from statutes by implication. This has long since

been disposed of by this Court. What was said, for example, as to the claimed immunity of "restricted" Indian lands from state taxation applies here: "The immunity formerly said to rest on constitutional implication cannot be resurrected in the form of statutory implication" (*Oklahoma Tax Comm. v. United States*, 319 U. S. 598, 604 [1942]). There this Court found that there was "not a word in the Act which even remotely suggests that Congress meant to exempt Indians' cash and securities * * *" from taxation, and accordingly (*ibid.*, p. 604):

"We conclude that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) application of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act." (To the same effect see *Oklahoma Tax Comm. v. Texas Co.*, 336 U. S. 342, 365 [1948].)

That is the precise situation here. Exemption from taxation must be expressly provided and cannot rest upon implication (*United States Trust Co. v. Helvering*, 307 U. S. 57, 69 [1939]), since, in the immunity area exemption is the exception, not the rule and the statute requires "much clearer language evidencing an intent to immunize * * * under these circumstances" (*Smith v. Davis*, 323 U. S. 111, 117 [1944]). In this area especially (*Oklahoma Tax Comm. v. Texas Co.*, *supra*, 336 U. S. 342, 365-366 [1948]):

"* * * The question whether immunity shall be extended in situations like these is essentially legislative in character. But Congress has not created an immunity here by *affirmative action*, and 'The immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication.' *Oklahoma Tax Commission v. United States*, 319 U. S. 598, 604. And see *Graves v. New*

York ex rel. O'Keefe, 306 U. S. 466, 480: " * * * if it appears that there is no grounds for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity." (Emphasis added.)

This is but another way of saying that "Silence of Congress implies immunity no more than does silence of the Constitution * * * and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity" (*Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 480 [1938], *cf. Mayo v. United States*, 319 U. S. 441, 447-448 [1942]).

We, therefore, submit that there is no merit to appellant's contention that § 548, *supra*, has not been amended by Congress in the sales and use tax area here involved. Since the implied immunity doctrine is judicial in origin and development, the Congress has *wisely* left the construction and application of § 548 to the courts, as in the present case, as well as in the case decided by the New York Court of Appeals, *Liberty National Bank*, *supra*, Appendix B, pp. 73-74 (*cf., e.g., National Bank of Detroit v. Department of Revenue*, 340 Mich. 573, 66 N. W. 2d 237 [1955], app. dism. for want of a substantial Federal question, 349 U.S. 934). Nor is there any merit to appellant's specious contention that in this case the Massachusetts decision below was "judicial legislation in the guise of judicial construction" (Br., p. 22). This is merely the usual unfounded conclusion often made when a decision is adverse; understandably, "adversity is not without comforts and hopes." Accordingly, absolutely no *need* exists in the present area for an amendment to

§ 548. It is for this precise reason that appellant's reliance upon Congressional inaction concerning the 1950 Senate Bill, S. 2547, is wholly misplaced and of no consequence. Indeed, the very Subcommittee hearings on this bill disclose that its Chairman noted this by saying that the *McCulloch* case, *supra*, was one "involving an effort to tax the Bank of the United States by the State of Maryland in such a way that the Bank could not have successfully operated" (emphasis added). The Federal Government did not oppose this bill, in any event (*Hearing Before a Subcommittee of the Committee on Banking and Currency*, United States Senate, Eighty-First Congress, Second Session on S. 2547, pp. 2-4). Of course, these sales taxes now involved in no way imperil any banking functions or operation—they are purely upon private retail transactions (see also pp. 14, 19, 49, 52-55 herein).

In sharp contrast to the Congressional silence with respect to sales and use taxation of national banks, the Congress has taken affirmative action elsewhere to either expressly permit or to prohibit this kind of taxation on many occasions with respect to its own property, and/or its *own instrumentalities* or "agencies of the United States" in the Acts creating them. Indeed, for example, when reporting on the taxable status of the Federal Limited Profit Mortgage Corporation, created under the National Housing Act of 1961, the Senate Committee on Banking and Currency reported (1961 *U. S. Code Cong. and Admin. News*, Vol. 2, pp. 2006-2007) :

"* * * This compilation lists 15 Federal statutes affecting corporations, financial institutions, or agencies of the Federal Government with tax exemption provisions. Thus, it would appear that the tax exemption provisions in S. 1342 are not unusual. This compilation is as follows:

1. Federal Reserve banks (12 U. S. C. 531).
2. Federal land banks (12 U. S. C. 931).
3. Federal Farm Mortgage Corporation (12 U. S. C. 1020f).
4. Federal Intermediate Credit Bank (12 U. S. C. 1111).
5. Central Bank for Cooperatives, Production Credit Association, banks for cooperatives (12 U. S. C. 1138c).
6. Federal home loan bank (12 U. S. C. 1433).
7. Federal savings and loan associations (12 U. S. C. 1464).
8. Federal National Mortgage Association (12 U. S. C. 1716).
9. Federal Savings and Loan Insurance Corporation (12 U. S. C. 1725).
10. Federal housing, certain debentures (12 U. S. C. 1747g).
11. Federal Deposit Insurance Corporation (12 U. S. C. 1825).
12. Reconstruction Finance Corporation (certain securities) (12 U. S. C. 607).
13. Commodity Credit Corporation (12 U. S. C. 713a-5).
14. Standard for Government securities generally (31 U. S. C. 868).
15. Public Housing Administration (42 U. S. C. 1405[e]).

National banks, of course, are not included as tax exempt. Where Congress has intended to grant immunization from all forms of state taxation, it has always done so in clear and unambiguous language. Thus, for example, when Congress desired to exempt Federal land banks from all state taxation, except real estate taxes, it provided:

"Every Federal land bank . . . , including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal and local taxation, except taxes, upon real estate held, . . . by said bank . . ." (12 U. S. C. § 931).

It did the same thing for the Federal Deposit Insurance Corporation where it used the same language (Title 12 U. S. C. A., § 1825). Indeed, the Banks and Banking Acts of the United States (Title 12, *supra*) are replete with similar provisions specifically dealing with the taxable status of Federal instrumentalities of the United States created by Congress (see *e.g.* the above itemized list).¹⁴ Moreover, Congressional intent for total exemption from any kind of tax is revealed by the deliberate choice in the statute of the phrase "all taxation" in order to accomplish that result, thereby eliminating sales and use taxes, otherwise permissible.

And, too, when Congress determined that the Reconstruction Finance Corporation should be exempt from all state taxes (except those on real estate) it explicitly provided:

"The Corporation, including its franchise, capital, reserves and surplus, and its income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality or local taxing authority. . . . The exemptions provided for in the preceding sentence with respect to taxation (*which shall, for all purposes, be deemed to include sales, use, storage, and purchase taxes*) . . ." (15 U. S. C. § 607, emphasis added).

In fact, when the purposes and functions of governmental lending agencies are compared with those of national banks, it is understandable why Congress immunized the land

¹⁴ National banks, in contrast, voluntarily come into being under enabling legislation (Title 12, *supra*, §§ 21 *et seq.*).

banks and the RFC from certain kinds of taxation, but not national banks. Federal Land Banks are cooperative farm credit associations designed to furnish credit to farmers at the lowest possible costs.¹⁵ Borrowers from land banks must be stockholders; thus, the profits of the land bank are returned to the borrower-stockholder, effectively reducing the interest costs (see *Federal Land Bank v. Kiowa County*, 368 U. S. 146 [1961]; cf. *Federal Land Bank v. Bismarck*, 314 U. S. 95 [1951]). Similarly organized as cooperative organizations to provide low cost credit to its members are the Federal Credit Unions which also have been immunized from state taxation (Title 12, *supra*, §§ 1752, 1768).

As for the Reconstruction Finance Corporation, all of its capital stock, of course, was owned by the Federal Government, its directors were appointed by the President, and its profits belonged to the Government. The purpose of the Reconstruction Finance Corporation was to extend loans and financing to distressed agricultural, commercial and financial institutions.

To enable the land banks and the RFC, for example, to fulfill their purposes better, Congress intended that their costs be kept as low as possible. Therefore, Congress in its discretion, specifically immunized these agencies from both Federal and State taxes.

By contrast, there could be no Congressional intent to reduce the costs of national banks, for to do so would benefit *only* its shareholders, not the national treasury or the bank's customers. Thus, where there are compelling considerations, Congress has explicitly exempted its Federal lending institutions from all taxes. Those considerations

¹⁵ The charges on mortgage loans are rigidly set to assure the lowest cost to the borrowers (12 U. S. C. § 771 ¶ Second).

are totally absent with respect to national banks, and there is no basis, therefore, for implying a sales tax exemption for them.

In sharp contrast, however, it is *only* when a *closed* national bank has been reorganized, that Congress, in a separate statutory provision, § 1821 of Title 12, has specifically granted total immunity to the new bank from *all* taxation, state and federal, despite the existence of § 548 of Title 12. Section 1821(i), *supra*, provides as follows:

“Notwithstanding any other provision of law the new bank, its franchise, property, and income shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority.”

Section 7507 of the Internal Revenue Code exempts insolvent or bankrupt national banks from taxes imposed by such code.

We submit that §§ 548 and 1821(i), *supra*, are *in pari materia* and must be construed together. (*Michigan National Bank v. Michigan*, *supra*, 365 U. S. 467, 481 [1960]). This clearly discloses the intent of Congress not to immunize an existing national bank from State and local sales and use taxes, otherwise § 548 would have been amended so as to effectuate the total immunity afforded by § 1821(i) to reorganized national banks. The immunity of closed banks from taxation serves the purpose of providing additional funds to the depositors, thus reducing the losses sustained.

Meanwhile, and in continued contrast, however, Congress has *waived* governmental immunity for certain true Federal instrumentalities ~~in recognition~~ that they, too, must support the cost of local government so as to permit the imposition of non-discriminatory sales taxes which otherwise

would be prohibited under the immunity doctrine. For example, Congress has permitted sales and use taxes upon Atomic Energy project contractors as the direct result of the decision in *Carson v. Roane-Anderson Co.* (342 U. S. 232 [1951]), by amending the Atomic Energy Act of 1946 (see *U. S. Senate Report No. 694*, pp. 1-8; Vol. III, *Senate Misc. Reports*, 83rd Cong., 1st Sess. and *cf. United States v. Boyd*, 378 U. S. 39 [1963]). Similarly, with respect to permissive state taxes which may be imposed in Federal areas, immunity also has been waived (4 U. S. C. A. §§ 105-107; *Offutt Housing Co. v. Sarpy Co.*, 351 U. S. 253, 257 [1957]; *Polar Co. v. Andrews*, 375 U. S. 361 [1963]; *Humble Pipe Co. v. Waggerner*, 376 U. S. 369 [1963]).

In comparison, national banks, however, which are privately owned and operated for profit, stand upon entirely different footings and no longer fall under, nor need the protective shield of the immunity doctrine. Consequently, we submit, there exists neither need, reason, nor justification for any corresponding Congressional waiver for them. Indeed, even as to the Federal government itself, the United States possesses "no constitutional immunity" from these taxes when they are imposed upon "private parties" even though "part or all of the financial burden of the taxes eventually falls on the Government" (*United States v. City of Detroit*, *supra*, 355 U. S. 456, 469). Of course, national banks are *private parties* within this concept in the first place, and, secondly, no financial burden is ever passed on to or sustained by the Government. Since Congress has not immunized national banks from these sales taxes, they may be imposed upon retail transactions entered into by national banks.

A fair construction of § 548 of the National Bank Act mandates its liberal and pragmatic application. Its pur-

pose is not to permit some forms of taxation by the states upon national banks and to *prohibit* all others. It deals *solely* with the taxation of shares, income and real property of national banks, as therein provided. It has always been an express Congressional recognition of the need for competitive tax equality between national and State banks, as its entire history clearly shows. It merely provides basic standards to assure that a State's tax system does not impose double taxation on national banks and its stockholders, or discriminate against national banks, so as to require tax equality between national banks and State banks. The intent of § 548 is to prohibit *only* those taxes which discriminate against national banks (see e.g., *Michigan National Bank v. Michigan*, 365 U. S. 467 [1961]; *Tradesmens Bank v. Tax Comm.*, 309 U. S. 560, 567 [1939]).¹⁶

The provisions of § 548, *supra*, are designed and intended *solely* to prevent states from imposing higher rates of tax on national banks than are imposed on other corporations with which such banks compete, and to prevent the double taxation that would result if, for example, the income of a national bank and the shares held by its stock-

¹⁶ Of course, too, New York State has always been mindful of a policy of tax equality for state and national banks. It has been a constitutional policy of this State since the 1938 State Constitutional Convention, and the adoption of Article 16, § 4 to the State Constitution. This section provides:

"Where the State has power to tax corporations incorporated under the laws of the United States there shall be no discrimination in the rates and method of taxation between such corporations and other corporations exercising similar functions and engaged in substantially similar business within the state."

This was designed to protect State and national banks (see *Revised Record, New York State Constitutional Convention*, 1938, Vol. II, pp. 1125-1138, Vol. III, pp. 2453-2461; *1938 Journal and Documents*, Doc. No. 2, p. 4; *Bank of Manhattan Co. v. Murphy*, 293 N. Y. 515 [1944]).

holders were both taxed (see *Mercantile National Bank v. New York*, 121 U. S. 120 [1886]; *Michigan National Bank v. Michigan*, 365 U. S. 467 [1961]).

Thus, in the *Mercantile National Bank* opinion, *supra*, this Court pointed out that unequal taxation of national banks would inhibit investments to the detriment of the national banks located therein, and found (121 U. S., at p. 155):

"The main purpose, therefore, of Congress, in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition by favoring institutions or individuals and operations and investment of a like character. The language of the Act of Congress is to be read in the light of this policy."

In *Michigan National Bank v. Michigan*, *supra*, this Court's most recent case on the subject of taxation of national banks, it was stated (365 U. S. at pp. 476-477):

"We believe that, granted satisfaction of the other qualifications of § 5219, a State's tax system offends only if in practical operation it discriminates against national banks or their shareholders as a class. That is to say, we could not strike down Act No. 9, as interpreted by Michigan's highest court, unless it were manifest that an investment in national bank shares was placed at a disadvantage by the practical operation of the State's law. According to our cases, discussed above, that clearly appears to have been the purpose of the Congress in enacting § 5219."

Nothing in this historical and well established policy of preventing discrimination against national banks is inconsistent with the imposition of a non-discriminatory sales or use tax which ultimately may be paid by them.

This is made perfectly clear by this Court's decisions, as well as by Congress, as demonstrated. The *McCulloch* case must be confined solely to its specific factual and legal circumstances which gave rise to the precise reason for the immunity doctrine. As the opinion clearly shows, and as later stated by this Court, that decision was one "in which it was held that a state tax laid *specifically upon the privilege of issuing bank notes* and in fact applicable alone to the notes of national banks, was invalid since it impeded the national government in the exercise of its power to establish and maintain a bank, implied as an incident to the borrowing, taxing, war and other powers specifically granted to the national government by Article I § 8 of the Constitution" (*Helvering v. Gerhardt*, 304 U. S. 405, 411 [1938], emphasis added). It was solely for this reason that the tax was struck down, *ibid.*, p. 411. This is certainly not the situation today, especially with respect to the sales taxes here involved, since no burden is imposed whatsoever upon the national government. Moreover, neither do these taxes, "infringe the national banking laws or impose an undue burden on the performance of the bank's functions" which is necessary to strike down state laws applicable to national banks (See e.g., *Anderson National Bank v. Luckett*, 321 U. S. 233, 247-248 [1943]). There this Court specifically noted that the statute "does not discriminate against national banks, cf., *McCulloch v. Maryland*, 4 Wheat., 316 * * *" (*ibid.*, p. 247, emphasis added). Later this Court, citing the *McCulloch* decision, stated "**** a State cannot levy a tax directly against the United States or its property without the consent of Congress" (*United States v. City of Detroit*, *supra*, 355 U. S. 466, 469 [1957]). The sales taxes here involved make no such attempt at all.

The restrictive application of the *McCulloch* doctrine of implied immunity was long ago illustrated in the construc-

tion of the National Bank Act of 1864, where the Supreme Court stated (*National Bank v. Commonwealth*, 76 U. S. 353, 361 [1869]):

"But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of State legislation."

and then stated (*ibid.*, p. 362):

"It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."

These principles have been consistently adhered to (see, e.g., *Hibernian Savings Society v. San Francisco*, 200 U. S. 310, 314-315 [1905]; *First National Bank v. Missouri*, 263 U. S. 640, 656 [1923]; and cases cited; *Lewis v. Fidelity Co.*, 292 U. S. 559, 566 [1933]). In other words, at this time and place, where the power to tax is *not* the power to destroy, it is permissible (see, e.g., *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, *supra* [1938]), and there can be "• • * no crippling obstruction of any of the Government's functions, no sinister effort to hamstring its power, not even the slightest interference with its property" (*City of Detroit v. Murray Corp.*, *supra*, 355 U. S. 489, 495 [1957]), nor do the New York statutes, as this Court said again, in a case decided December 5, 1967 "• • * retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." (*Nash v. Florida Industrial Commission*, 389 U. S. 235, 240 [1967].) Nor can there be any such effect upon this appellant either.

Indeed, quite the contrary has occurred. The record is completely devoid of any showing, and none can be established, that appellant's banking operations would be in any way impaired, let alone destroyed, by the imposition of the taxes here involved.

As to Liberty National Bank, between December 31, 1962 and December 31, 1966, for example, it had tremendous business growth despite the imposition of New York taxes, as disclosed by the following tabulation:¹⁷

	<i>Total Assets (In Millions of Dollars)</i>	<i>Offices</i>
12/31/62	\$250.6	27
6/30/63	273.7	30
12/31/63	287.3	31
12/31/64	338.8	32
6/30/65	365.4	33
12/31/65	378.5	34
12/31/66	408.3	34

Since sales and use taxes did not exist as revenue measures at the time the National Bank Act was enacted in 1864, or even at the time of its most recent amendment in 1926 (*supra*), it is unreasonable and wholly unjustified to assume that Congress intended to prohibit such taxes, at least when they are imposed in a non-discriminatory manner on purchases made by national banks. It is only since the early 1930's that such taxes have become significant factors in State tax structures (see, e.g., *State Taxation of Interstate Commerce*, 89th Cong. 1st Sess. H. Rpt. No. 565, p. 608). No state had adopted a sales tax earlier than 1932 (*ibid.*, Table 19-1, p. 610). The New York State sales tax with which we are concerned was adopted in 1965 (Ch. 93); the Erie County Sales and Use Tax was adopted in 1947;

¹⁷ Sources: Rand McNally Bankers' Directory; New York Federal Reserve Bank; New York State Banking Department Annual Reports for the period covered.

and the New York City Sales and Use Tax in 1934 (Local Law, No. 25).

We have found no case where this Court has ever struck down non-discriminatory sales taxes payable by national banks of the kind present here imposed upon their own *private retail business transactions*, as distinguished from other kinds of taxes imposed *directly upon such banks or* their banking functions, an entirely different matter. Equally important, too, neither have such taxes ever been prohibited by Congress, although it has done so with its own agencies and fiscal institutions, as shown, *supra*. Quite the contrary, all of the reported cases, which we have examined and analyzed, have dealt with various taxes imposed pursuant to 12 U. S. C. A. § 548 (15 Stat. 34, R. S. § 5219 of the Revised Statutes, as amended) at the time of their enactment. Upon their review this Court either approved them or condemned them. That is why, we submit, this Court has stated, as it has often done in a generalized way in respect *solely as to these distinguishable taxes*: "There can be no taxation of the banks, their property or their capital stock otherwise than in conformity with the terms and restrictions embodied in the assent given by Congress to such taxation" (*i.e.*, by § 548, *supra*). This is made perfectly clear from the very cases where this quoted language appears, *viz. Des Moines Bank v. Fairweather*, 263 U. S. 103, 106 (1923), (citing several earlier cases to the same effect, including *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664 [1899]); *First National Bank v. Anderson*, 269 U. S. 341, 347 (1925); and *Michigan Nat. Bank v. Michigan*, 365 U. S. 467, 473 (1960). Others, of course, could have been cited, too, such as *Tradesmens Bank v. Tax Comm.*, 309 U. S. 560 (1939), the last tax case reviewed by this Court prior to the *Michigan National Bank* case, *supra*. Consequently, all of these cases con-

struing § 548, *supra*, must be confined solely to those taxes specified therein—not to sales taxes.

The same is true, of course, as we have said earlier, with respect to the case of *Bank of California v. Richardson*, 248 U. S. 476 [1918] and as to the others which are also erroneously relied upon by the appellant.

As shown, § 548 is a *permissive* statute not a prohibitive one as to sales taxes which in no way impair any banking function, as do the taxes specified in § 548. This conclusion is certainly not affected by the opinion in *Colorado Nat. Bank v. Bedford*, 310 U. S. 41 (1939) also erroneously relied upon by the appellant. The opinion in the *Colorado Bank* case, *supra*, is merely a logical extension of the rationale quoted above. This is patent in the opinion and by the citation therein of the *Owensboro* and *First National Bank* cases, *supra*. This Court observed as to § 548 (§ 5219), after discussing the operation of safe deposits as a permissible banking function of national banks and a state tax imposed and collected from the safe depositors, that (*ibid.*, pp. 50-51):

“(3) We may assume, as did the Supreme Court of Colorado, that the tax is invalid if laid upon the bank as an instrumentality of government in the incidents referred to in the proceeding section; that its banking operations are free from state taxation except as Congress may permit, that Congress permits the taxation only of shares and real estate, and that Congress may intervene to protect its instrumentalities from any other tax which threatens their usefulness.”

From this it is perfectly clear that the observation certainly does not apply to the situation here. The taxes imposed here are solely on the *retail transaction*, not upon the bank (see e.g. *United States v. City of Detroit*, *supra*, 355 U. S. 466, 470-471; *Young & Co. of Austin v. Calvert*, 405 S. W. 2d 174 [1966], cert. den. 386 U. S. 914 Feb. 13 [1967]).

The fiscal needs of the States compel a full re-examination of the immunity doctrine in the light of present-day tax measures so necessary to offset rising costs of government.¹⁸ We submit that nondiscriminatory sales and use taxes must be *equated* with real property taxes because they fall into the same general category serving the same purpose. The latter have never been prohibited since the decision in *McCulloch v. Maryland*, *supra*, 17 U. S. 316, where it was conceded that the Bank was subject to real property taxation for the support of government, and where it was said, at p. 435:

“This opinion does not deprive the states of any resources which they originally possessed. *It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state*, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state.” (Emphasis added.)

This is why real property taxation is not prohibited by § 548, subd. 3, *supra*. Of course, at the time of the *McCulloch* decision there was no Federal statute dealing with the taxation of banks. Consequently, this Court had to judicially immunize the Bank of the United States by (1) formulating the implied immunity doctrine in order to strike down the tax there involved, and (2) having done so, it then had to take real property taxes outside of this doctrine as a right preserved to the States and still retained and which would be, even in the absence of § 548, subd. 3, in any event.

¹⁸ As a matter of fact, it was for this very reason, as the Congressional debates show; that Congress permitted the taxation of the national banks in 1864 in order that State taxes “Shall be paid to support the State governments, the city governments, and county governments, the local municipal corporations of the different States” (See e.g., *Cong. Globe*, 38th Cong., 1st Sess., *supra*, Vol. 34, Part 2, p. 1897).

Since needed revenue can no longer be obtained by increased real property taxes, additional sources of revenue had to be found. Indeed, it was because of the financial burden upon real property that specific limitations upon its taxation are presently contained in the New York State Constitution (Article VIII, § 10; see also *Problems Relating to Taxation and Finance*, 1938 Constitutional Convention Committee, Vol. X, p. 253). The entire history of retail sales taxation in New York State, both State and local, clearly shows that they have been enacted in lieu of real property taxes and as a direct result of the fact that real property could no longer sustain this burden. Chapter 726 of the Laws of 1930 created the New York State Commission for the Revision of the Tax Laws to recommend legislation to "relieve present sources of revenue, particularly *real estate* which now bears a disproportionate part of the whole tax burden of the State." (§ 1, Emphasis added.) As the result, the first State sales tax was enacted by Laws of 1933, Ch. 281, and 25% of its yield was to be apportioned among the localities. While Ch. 281, *supra*, expired by its terms in 1934, New York City was empowered by Laws of 1934, Ch. 873 to enact local sales tax legislation, and New York City Local Law No. 25 was enacted (*Local Laws of Cities and State*, pp. 164-175, now title M & N of Chapter 46 of the New York City Administrative Code). During the 1940's, it was again found that real property taxation no longer could meet the *rising costs* of government, and, in fact, a reduction of property taxation was needed (see Governor Dewey's Message to the Legislature in 1946, *Public Papers of Governor Dewey*, 1946, pp. 32-35). As a result of the 1945 and 1946-*Reports of the Commission on Municipal Revenues and Reductions of Real Estate Taxes*, Governor Dewey, in 1947, recommended granting additional taxing powers, including retail sales taxes to cities and counties (*Public Papers of Governor*

Dewey, 1947, pp. 171-175). This resulted in the enactment of Laws of 1947, Ch. 278, authorizing counties and New York City to impose retail sales taxes, and eventually other enabling legislation permitted other cities to impose retail sales taxes (Laws of 1948, Chs. 489, 651; Laws of 1949, Chs. 454, 806; Laws of 1950, Chs. 589, 590). Generally the proceeds under this enabling legislation were to be used for educational purposes, and in the case of the City of New York, for any city purpose. Approximately 80% of the revenues presently derived from the State-wide sales tax, are returned to the localities (Laws of 1965, Ch. 83).

It was for the very reason to relieve the local real property tax in the District of Columbia that Congress enacted the District of Columbia Sales and Compensating Use Tax by Public Law No. 76; 1949, ch. 146, vol. 63, p. 112 *et seq.*, as amended, (see *U. S. Cong. Service* 1949, vol. 2, p. 1297 *et seq.*), and which specifically imposes such tax upon national banks by Title XIII, § 47—2605 thereof.

Nondiscriminatory sales taxes, imposed upon the *retail transaction*, inflict no more financial burden upon national banks than do real property taxes. Each is for the general support of government and each is merely an incident in the cost of doing a *private* banking business, a legitimate price to pay, as it is for their State bank competitors. Economic preference to escape the fair share of local taxation is no longer sanctioned under the immunity doctrine (*United States v. City of Detroit*; *supra*, 355 U. S. 466, 473). To this extent, therefore, sales taxes merely enter into the cost of such business as any other cost, affecting only the shareholders by a reduction in ultimate earnings or profits otherwise available to them. But this same result also occurs, of course, with real property taxes just as it also does with an income or franchise tax imposed upon the bank of the kind contemplated by § 548, *supra*.

Therefore the construction of § 548, *supra*, must be a pragmatic one, in view of the "entire tax structure of the State as a whole", and not merely as to the specific taxes here involved (see, e.g., *Security-First National Bank v. Franchise Tax Board*, 359 P. 2d 625, 628 [1961], [citing *Tradesmens Bank v. Tax Commission*; 309 U. S. 560, 567-568], app. dism. and cert. den. 368 U. S. 3; *Phillips Co. v. Dumas School District*, 361 U. S. 376, 383 [1959]). Consequently, as we have shown, the sales taxes here involved were enacted in lieu of and equivalent with real property taxes, which are no longer adequate for revenue purposes. Should this Court immunize national banks from sales taxation, then their real property taxes might have to be increased to offset this loss. Additionally, their preferential franchise tax treatment, presently accorded to national banks by New York Tax Law, Article 9-C, § 219-rr, over business corporations which are taxable by New York Tax Law, Article 9-A, might have to be eliminated by the Legislature, as well. This latter eventuality has, in fact, occurred in California (see *Security-First National Bank v. Franchise Tax Board*, *supra*): National banks presently are taxed in New York State on their franchise at a rate which is 1% less than 9-A business corporations, even though the latter are subject to the sales taxes, too (see L. 1953, c. 308; 1953 *Legis. Annual*, pp. 299-300; 1952-1953 *Annual Report of the State Tax Commission*, 1953 *Leg. Doc.*, No. 99, pp. 45-46, 47-48).

Finally, there is no merit to any possible contention that national banks fall within the meaning of New York Tax Law, § 1116 as an exempt organization therein defined. That section merely provides immunity to "United States of America, and any of its agencies and instrumentalities, insofar as it is immune from taxation * * *". This is merely a statutory recognition of the implied immunity

doctrine borrowed from earlier provisions of past legislation, as well as from similar language in other articles of the Tax Law. It is really not needed if that doctrine applies, since the doctrine stems from the Constitution of the United States, but as we have clearly shown, national banks are no longer entitled to this constitutional immunity.

CONCLUSION

National banks are not entitled to implied constitutional or statutory immunity from State and Local Sales and Use taxation, and the appeal should be dismissed for want of a substantial federal question.

Dated: March 25, 1968.

Respectfully submitted,

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APPENDICES

Appendix A

"NATIONAL BANK SHARES

§ 548. State Taxation

The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall *be in lieu of the others*, except as hereinafter provided.***

(b) In the case of a tax on said shares the tax unpaid shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks.***

(c) In case of a tax on or according to or measured by the net income of an association. *** the rate shall not be higher than the rate assessed upon other financial corporations.***

(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

* * *

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value as other real property is taxed (Emphasis added).

* * *

Appendix B

**LIBERTY NATIONAL BANK AND TRUST COMPANY, Respondent,
v. WILLIAM K. BUSAGLIA, as Director of the Division of
Sales Tax, County of Erie, et al., Appellants.**

Decided December 29, 1967.

APPEALS, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered June 17, 1966, in a proceeding under CPLR article 78 (submitted pursuant to CPLR 3222 upon an agreed statement of facts, and transferred to the Appellate Division by an order of the Supreme Court at Special Term, entered in Erie County), which (1) adjudged that State and county sales and use taxes could not lawfully be imposed on receipts from sales and services made or rendered to petitioner national bank, and (2) directed respondent Director of the Erie County Sales Tax Division to refund the amount of such taxes collected from petitioner bank.

Louis J. Lefkowitz, Attorney-General (Robert W. Bush and Ruth Kessler Toch of counsel), for appellants.

Alan H. Vogt, William D. Schulz and John J. LaFalce for respondent.

KEATING, J. The question presented for our consideration is whether the Liberty National Bank and Trust

Company is an instrumentality of the United States Government and, therefore, as a purchaser, is immune from sales and use taxes imposed by the State of New York and the County of Erie.

There is no dispute with regard to the applicable constitutional law—the rule is clear that the Government of the United States, its agencies and instrumentalities may not be subjected to taxation by State and local governments, absent congressional consent. (See, e.g., *Department of Employment v. United States*, 385 U. S. 355.) The question merely is whether a national bank is an instrumentality of the Federal Government. The bank, in support of its tax-immune status, cites a long line of cases holding that a national bank is an instrumentality of the Federal Government. (See, e.g., *M'Culloch v. Maryland*, 4 Wheat. [17 U. S.] 316; *Osborn v. Bank of United States*, 9 Wheat. [22 U. S.] 738; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664). We must keep in mind, however, in reviewing these cases, that what must be determined here is in essence a question of fact—"whether [the] institution is so closely related to governmental activity as to become a tax-immune instrumentality" (*Department of Employment v. United States*, 385 U. S. 355, 358-359, *supra*).

The cases which have held that national banks are instrumentalities of the Federal Government go back almost to the beginning of our republic and involve institutions whose activities are so different and varied that their value as precedent is open to serious question. As Mr. Justice BRANDEIS has written in a dissenting opinion which has since been adopted by the Supreme Court. "[T]he decision of the Court, if, in essence, merely the determination of a fact, is not entitled, in later controversies be-

tween other parties, to that sanction which, under the policy of *stare decisis*, is accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile. * * * Moreover, the judgment of the Court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned. In cases involving constitutional issues of the [kind presented here], this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may * * * 'depend altogether on the force of the reasoning by which it is supported' " (*Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 392, 412-413¹; see, also, *Smith v. Allwright*, 321 U. S. 649, 656).

The leading case in this area and a landmark decision in American jurisprudence is *M'Culloch v. Maryland* (*supra*). It was in this case that the Supreme Court upheld the power of Congress to charter a national bank and, in addition, held that the bank thus created was subject to immunity from taxation "on [its] operations" (4 Wheat. [17 U. S.] 436).

The national bank involved in *M'Culloch v. Maryland* (*supra*) and *Osborn v. Bank of United States* (*supra*) was one in which the Federal Government subscribed to and owned 20% of the capital stock. The President of the United States had the power to appoint 5 of the 25 members

¹ The majority opinion from which Mr. Justice BRANDEIS dissented as well as the precedent which he would have no longer followed were overruled in *Helvering v. Producers Corp.* (303 U. S. 376, 387). The issue in those cases involved a question of the amenability of government instrumentalities to taxation. The court ultimately determined that leases of State-owned property—contrary to prior decision—were not instrumentalities of the State.

of the Board of Directors and the Government participated in the election of the remaining directors. The Secretary of the Treasury was required to deposit all Federal moneys in the bank and the bank was required to transmit funds for the Federal Government without charge. Moreover, paper currency issued by the bank was made legal tender for the purpose of paying all debts owing to the Federal Government, and the bank acted as a fiscal agent for the United States and handled its foreign exchange transactions (see, generally, Studenski and Kroos, *Financial History of the United States* [1952], pp. 83-88, 103-106). It was in this context that Chief Justice MARSHALL noted that the bank was "the great instrumentality by which the fiscal operations of the government are effected" (*Osborn v. United States*, 9 Wheat. [22 U. S.] 738, 860, *supra*), and was thus immune from discriminatory taxes which hostile State governments sought to levy.²

In striking down these taxes which were designed to destroy and hamper an institution which was clearly an instrumentality of the national Government, Chief Justice MARSHALL wrote in *M'Culloch v. Maryland* (*supra*, pp. 436-437): "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and

² In *M'Culloch v. Maryland* (*supra*) the State sought to tax the currency issued by the national bank—a tax on the very performance of a governmental function and in *Osborn* the State imposed a \$50,000 tax on each office. In both instances the tax was blatantly discriminatory as no similar tax was imposed on State banks.

is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional."

The charter of the national bank with which *McCulloch* and *Osborn* dealt expired in 1836—no such bank with similar functions has been chartered by Congress since that period. The next major congressional action with regard to national banks came during the Civil War period with the enactment of the National Bank Acts of 1863-1864. While the relationships of national banks to the government under the statute was not as close as that of the earlier Bank of America, they, nevertheless, were actively engaged in the governmental function of issuing notes which served as the Nation's currency. It was this national bank system which the Supreme Court dealt with in *Owensboro Nat. Bank v. Owensboro* (173 U. S. 664, *supra*). In that case the court struck down a tax on the intangible property of a national bank—a tax which was also allegedly discriminatory in some respects (*supra*, p. 665).

In *Owensboro* and subsequent cases which have followed, the court has continued to rely on *McCulloch v. Maryland* and *Osborn v. United States* without undertaking *de novo* examinations of the functions of the bank in each instance. (See e.g. *First Nat. Bank v. Anderson*, 269 U. S. 341 [1926]; *First Nat. Bank v. Hartford*, 273 U. S. 548 [1927]; *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239 [1931]; *Colorado Nat. Bank v. Bedford*, 310 U. S. 41 [1940]; see, also, *People ex rel. Bridgeport Sav. Bank v. Feitner*, 191 N. Y. 88 [1908]; *People ex rel. Hanover Nat. Bank v. Goldfogle*, 234 N. Y. 345 [1922].) While such reliance may have been justified during the period when national

banks continued to issue currency—a function which terminated in 1935, we believe the time has come when the tax-immune status of national banks must be re-examined in light of both their present day function as well as other Supreme Court decisions which have set forth criteria for making determinations similar to that which we are required to make here.

An examination of the Supreme Court's decisions in this area reveals a general curtailment of the class of instrumentalities which are viewed as tax immune. The court appears to be placing greater stress upon the nature of the tax and its actual effect upon the furtherance of the governmental functions involved rather than relying upon a "mechanical application of the rule that government instrumentalities are immune from taxation" (*Education al Films Corp. v. Ward*, 282 U. S. 379, 391-392.)³

The earliest and most significant of these decisions is *Railroad Co. v. Peniston* (18 Wall. [85 U. S.] 5 [1873]). In that case the *Union Pacific Railroad Company*, a corporation chartered by Congress, challenged a tax laid upon its property by a subdivision of the State of Nebraska. The Supreme Court proceeded first to consider the arguments advanced in support of the railroad's argument that it was an instrumentality of the United States to the extent that it was entitled to the same tax immunity as the government itself:

"It is insisted on behalf of the plaintiffs that the tax of which they complain has been laid upon an agent of the General government constituted and organized as an in-

³ "[T]he implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of one government correspondingly curtails the sovereign power of the other to tax." (*Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 483.)

strument to carry into effect the powers vested in that government by the Constitution, and it is claimed that such an agency is not subject to State taxation. That the Union Pacific Railroad Company was created to subserve, in part at least, the lawful purposes of the National government; that it was authorized to construct and maintain a railroad and telegraph line along the prescribed route, and that grants were made to it, and privileges conferred upon it; upon condition that it should at all times transmit dispatches over its telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon the railroad for the government, whenever required to do so by any department thereof, and that the government should at all times have the preference in the use of the same for all the purposes aforesaid, must be conceded. Such are the plain provisions of its charter. So it was provided that in case of the refusal or failure of the company to redeem the bonds advanced to it by the government, or any part of them, when lawfully required by the Secretary of the Treasury, the road, with all the rights, functions, immunities, and appurtenance thereunto belonging, and also all lands granted to the company by the United States which at the time of the default should remain in the ownership of the company, might be taken possession of by the Secretary of the Treasury for the use and benefit of the United States. The charter also contains other provisions looking to a supervision and control of the road and telegraph line, with the avowed purpose of securing to the government the use and benefit thereof for postal and military purposes. It is unnecessary to mention these in detail. They all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices for the General government. Notwithstanding this, the railroad and the

telegraph line are neither in whole nor in part the property of the government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The government owns none of its stock, and though it may appoint two of the directors, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which the company assumed, the engagements to which we have already alluded.

"Admitting, then, fully, as we do, that the company is an agent of the General government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation" (pp. 31-32).

The court proceeded to answer the question in the negative. It rejected the argument that, merely because the corporation received its charter from the Federal Government, it was a tax immune instrumentality and it outlined the dangers which would result if all those private corporations which performed services for the government were exempt from State taxation: "It may, therefore, be considered as settled that no constitutional implications prohibit a State tax upon the property of an agent of the government merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon al-

most every railroad. Telegraph lines are employed in the National service. So are steamboats, horses, stage-coaches, foundries, ship-yards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the General government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the General government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited" (p. 33.)

The court held that, as long as the tax did not interfere with the performance of the function served by the private corporation involved, it was not *impliedly* immune from the State taxation.

The *Peniston* case was followed in *Broad Riv. Power Co. v. Query* (288 U. S. 178), in which the court upheld a tax on the production and sale of electricity generated by a hydroelectric company which constructed and operated its plant by permission and under supervision of the Federal Government. The court speaking through Chief Justice HUGHES, wrote (pp. 180-181): "It is apparent, however, that the complainant in generating and selling power is not acting as an agent for the Government. It acts with the Government's permission, and while it may be said to have received a privilege from the Government, it is not a privilege to be exercised on behalf of the Government. The tax is not upon the exertion of,

and cannot be said to burden, any governmental function. * * * The tax is not laid upon the license granted by the Federal Water Power Commission but upon the production and sale of power which the company generates at its own pleasure and exclusively for its own profit. Notwithstanding the special characteristics of electrical energy, the company is engaged in producing and selling an article of trade. * * * The product is property. The fact that a privilege has been received from the Federal Government does not exempt that property or the local business in producing and selling it from the burdens of taxation otherwise valid" (See, also, *Williams v. Talladega*, 226 U. S. 404, 416; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 549; *Alward v. Johnson*, 282 U. S. 509; *Indian Territory Illuminating Oil Co. v. Board of Equalization*, 288 U. S. 325).

It is clear from the cases cited and discussed that privately owned and operated business enterprises which perform services for the government and/or exist and operate by virtue of a Federal charter or franchise are not *per se* immune from nondiscriminatory State taxation which does not impede the performance of their service for government or the privilege granted by the government charter or franchise granted. As Justice STONE wrote in upholding a New York State nondiscriminatory tax upon a corporate franchise, notwithstanding the inclusion of tax exempt income in the measure of it: "This Court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our Constitutional system, under which both

the federal and the state governments exercise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other" (*Educational Films Corp. v. Ward*, 282 U. S. 379, 391-392; see, also, *Reconstruction Fin. Corp. v. Beaver*, 328 U. S. 204; cf. *United States v. Yazell*, 382 U. S. 341).

We turn then to the original question posed—given the background of the cases upon which the Liberty National Bank and Trust Company relies and the further decisions of the Supreme Court in defining instrumentalities for tax immunity purposes, is the bank entitled to a constitutionally implied immunity from State taxation as an instrumentality of the Federal Government? We conclude that the answer is that it clearly is not.

National banks, though federally chartered, are privately owned and operated primarily for the private benefit of their owners. Like State chartered banks, they are depositories for Federal funds—indeed, legislation forbids discrimination for that purpose between State and national banks which are members of the Federal Reserve System (U. S. Code, tit. 12, § 265).⁴ In addition, like any private enterprise or individual engaging in activities affected with a public interest, they are subject to severe Government regulation. This regulation, accomplished via membership in the Federal Reserve System (membership which is open to State banks on a voluntary basis [U. S. Code (1964), tit. 12, § 321]), is, however, hardly sufficient

⁴ Over one fourth of all moneys subject to Federal Reserve System Regulation are in such State chartered banks. (National Summary of Accounts and Deposits in All Commercial Banks, Federal Deposit Insurance Corporation, June 30, 1966.)

to render national banks an instrumentalities of the Federal Government so as to entitle them to the same immunity from taxation as the Government itself (*Railroad Co. v. Peniston, supra*; *Broad Riv. Power Co. v. Query, supra*; *Western Union Tel. Co. v. Massachusetts, supra*; cf. *Spevack v. Klein*, 385 U. S. 511, 520 [concurring opn. of FORTAS, J.]).

Moreover, we are dealing here with a nondiscriminatory tax, immunity from which, it is conceded, will give national banks no more than an "imperceptible economic advantage" (respondent's brief, p. 18) over their State competitors and we assume, conversely, that nonimmunity from the tax will have little or no effect on their operations or the services they perform for the Government. Under these circumstances, we see no basis in law or logic for immunizing national banks from the taxation with which we are concerned here.

Such cases as *Colorado Nat. Bank v. Bedford* (310 U. S. 41, *supra*) and *Department of Employment v. United States* (385 U. S. 355, *supra*) upon which the bank relies do not conflict with this conclusion.

In the *Colorado Nat. Bank* case the Supreme Court held that, in the absence of contrary legislation by Congress, a State law laying a percentage tax on the users of the safety deposit services of banks measured by the banks' charges for the services, and requiring the banks to collect the taxes and account for them to the State and include them in their bills for the services, was valid.

The case was decided in 1940, and the court recognized that the national bank's usefulness as an agency to provide for currency, "has diminished markedly" (p. 48) and merely "assum[ed] * * * that its banking operations are

free from state taxation except as Congress may permit" (p. 50; emphasis added).

The basis of the court's decision was that the tax was not on the bank as the owner of the safe deposit box but rather that it was upon the customer as the user. If the tax had been upon the bank as the owner of the box, the bank would have passed the tax on to the customer and, since it was responsible for the collection of the tax in any event, it becomes rather clear that the distinction drawn by the court was one without a difference.

The court went on to note significantly that the burden placed upon the bank to collect and remit the tax did not pose an unconstitutional burden.

In light of the court's language as well as the result reached, we cannot agree that this case precludes us from reconsidering prior case law. Indeed, highly technical distinctions of the kind made by the court in deciding this case, in areas badly in need of re-examination, have often been preludes to the ultimate rejection of old and no longer rational precedent. (Compare *Goldman v. United States*, 316 U. S. 129, and *Silverman v. United States*, 365 U. S. 505, with *Katz v. United States*, 389 U. S. 347.)

The reasoning of the second case relied on by the bank clearly supports our conclusion regarding the status of national banks. In *Department of Employment v. United States* (*supra*) the court held that the American National Red Cross was a tax-immune instrumentality of the Federal Government. The court's analysis is significant and instructive. Mr. Justice FORTAS, speaking for the court, wrote (385 U. S., *supra*, pp. 358-360): "Although there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to be-

come a tax-immune instrumentality, the Red Cross is clearly such an instrumentality * * * Congress chartered the Red Cross in 1905, subjecting it to governmental supervision and to a regular financial audit * * * Its principal officer is appointed by the President, who also appoints seven (all government officers) of the remaining 49 Governors * * * By statute and Executive Order there developed upon the Red Cross the right and obligation to meet this Nation's commitments under various Geneva Conventions, to perform a wide variety of functions indispensable to the workings of our Armed Forces around the globe, and to assist the Federal Government in providing disaster assistance to the States in time of need. Although its operations are financed primarily from voluntary private contributions, the Red Cross does receive substantial material assistance from the Federal Government. And time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status as an arm of the Government."

The contrast between activities and functions of the American National Red Cross and that of the Liberty National Bank and Trust Company is so striking that no further elaboration is required.

We must note, however, as the bank points out, that there is dictum in the Red Cross opinion which supports its contention on this appeal. Thus the court wrote (p. 360): "In those respects in which the Red Cross differs from the usual government agency—e.g., ~~in that~~ its employees are not employees of the United States, and that government officials do not direct its everyday affairs—the Red Cross is like other institutions—e.g., national banks—whose status as tax immune instrumentalities of the United States is beyond dispute."

If the Supreme Court had dealt with the precise problem with which we are concerned here—namely the status of national banks—we would, of course, follow that decision without question. We believe that the court's reference to national banks is clearly understandable in the context in which it was rendered, since the precedents cited and discussed earlier have never been rejected and the status of national banks as taximmune instrumentalities was not disputed in that case. It is obvious, however, that the *reasoning* of the court's decision and its holding squarely support the position we take here and the similar position recently taken by the Supreme Judicial Court of Massachusetts (*First Agric. Nat. Bank of Berkshire County v. State Tax Comm.*, 229 N. E. 2d 245 [Mass., 1967]). Until the Supreme Court holds that *national banks of today* are to be deemed immune from contributing their fair share of the taxes necessary to enable State and local governments to provide the essential services from which the banks themselves benefit, we decline to do so.

We, of course, recognize that, even though the bank is not automatically entitled to a constitutional immunity from taxation, Congress has the power to immunize national banks and other federally chartered institutions from this type of taxation. There is, however, no such statute presently in effect.

Section 548 of title 12 of the United States Code, the only Federal statute dealing with State taxation of national banks, is merely designed to insure that the inherent taxing powers which were recognized in *M'Culloch v. Maryland* (*supra*)—e.g., the power to tax the real property of the banks as well as the privately owned shares—be exercised in a nondiscriminatory fashion. As the Supreme Court recently wrote: “Congress enacted the Section in 1864

and this Court has passed on it over 55 times in the near century of the Section's existence. During that period the Court has kept clearly in view, as was said in the last case in which it wrote, that 'the various restrictions [§ 548] *** places on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class.' " *Michigan Nat. Bank v. Michigan*, 365 U. S. 467, 472-473.)

There is nothing whatever in the statute which indicates an intent to immunize national banks from nondiscriminatory State taxation such as this and "[T]he immunity formerly said to exist on constitutional implication cannot now be resurrected in the form of statutory implication" (*Oklahoma Tax Comm. v. United States*, 319 U. S. 598, 604). "If it appears that there is no ground for implying a constitutional immunity, there is equally a want of any grounds for assuming any purpose on the part of Congress to create an immunity." (*Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 480, *supra*; see, also, *Oklahoma Tax Comm. v. Texas Co.*, 336 U. S. 342, 365-366.)

We note in conclusion that the problems which face State and local governments in meeting their responsibilities in our complex society require the expenditure of vast amounts of money. The Liberty National Bank and Trust Company has not presented us with a single rational argument, aside from a string of cases which were relevant in another time and under different circumstances, why it should not, like any other individual or business enterprise, contribute to the costs. We perceive none.

We wish to take special note of the exceptionally well-written and researched briefs submitted by both parties.

The order of the Appellate Division upholding the tax-immune status of the Liberty National Bank and Trust Company should be reversed, with costs, and the petition should be dismissed.

Chief Judge FULD and Judges VAN VOORHIS, BURKE, SCILEPPI, BERGAN and BREITEL concur.

Order reversed, etc.

SUPREME COURT, U. S.

MAR 29 1968

No. 755.

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1967.

FIRST AGRICULTURAL NATIONAL BANK OF

BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF
MASSACHUSETTS.

BRIEF FOR THE STATE TAX COMMISSION.

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Act of September 7, 1916, 39 Stat. 752	21
Act of September 26, 1918, c. 177, 40 Stat. 967	21
Act of March 4, 1923, c. 267, 42 Stat. 1499	44
Act of March 25, 1926, c. 88, 44 Stat. 223	44
Act of February 25, 1927, c. 191, 44 Stat. 1224, § 16	21
Legal Tender Act, February 25, 1862, 12 Stat. 345	10
12 U.S.C. § 21 et seq.	2, 3, 5, 8, 9, 21, 22, 26
12 U.S.C. § 531	38n.

TABLE OF AUTHORITIES CITED

v

12 U.S.C. § 548 (Rev. St. § 5219, as amended)	
	2, 3, 5, 8, 9, 38, 40, 41, 42, 44, 45
26 U.S.C. § 581, 26 C.F.R. § 1.581-1	27, 38
28 U.S.C. § 1257(2)	2
Mass. Sales and Use Tax Law, St. 1966, c. 14, §§ 1, 2	3, 36
Mass. St. 1967, c. 757, inserting cc. 64H, 64I	3n.

MISCELLANEOUS.

Anderson, Thomas J., Jr., "Federal and State Control of Banking" (1934), pp. 53-88	9n.
Annual Report of the Board of Governors of the Federal Reserve System for 1935, pp. 27-28	19
Annual Report of the Board of Governors of the Federal Reserve System for 1951, pp. 3, 98	20
Annual Report of the Comptroller of the Currency for 1965-1966, p. 13	9n.
Annual Report of the Secretary of the Treasury for the Fiscal Year Ended June 30, 1951, p. 271	20
Board of Governors of the Federal Reserve System, "The Federal Reserve System—Purposes and Functions" (5th ed., rev. 1967), pp. 274-277	27
Catterall, Ralph C. H., "The Second Bank of the United States" (1903), p. 6	29
Clarke, M. St. Clair, and D. A. Hall, "Legislative and Documentary History of the Bank of the United States" (1832), p. 609	29
Davis, Andrew MacFarland, "The Origin of the National Banking System," National Monetary Commission (1910)	9n., 11
Dewey, Davis R., "Financial History of the United States" (12th ed., 1936), pp. 322, 493	10, 18

Friedman, Milton, and Anna J. Schwartz, "A Monetary History of the United States 1867-1960" (1963), p. 16	13
Hackley, Howard H., "Our Baffling Banking System," 52 Virginia L. Rev., pp. 565, 771, 814, 827 (May and June, 1966)	28, 21, 34n.
Hammond, Bray, "Banks and Politics in America from the Revolution to the Civil War" (1957), p. 227	28
Hammond, Bray, "Historical Introduction," in "Banking Studies," Federal Reserve System (1941), pp. 10-14	9n.
Kemmerer, Edwin W., "The ABC of the Federal Reserve System" (11th ed., 1938), p. 61	18
Kroos, Herman E., "The Historical Background of the American Banking System"	31
Miller, Henry E., "Banking Theories in the United States before 1860" (1927), pp. 12, 14	10
Noyes, Alexander D., "History of the National-Bank Currency," National Monetary Commission (1910), p. 20	15
Paris, James D., "Monetary Policies of the United States, 1932-1938" (1938), p. 90	19
Prochnow, Herbert V., "The Federal Reserve System" ed. (1960), pp. 1, 7, 113, 132	20, 31
"Second Report on the Further Provision Necessary for Establishing Public Credit" in "The Papers of Alexander Hamilton," Harold C. Syrett (ed. 1963), pp. 305, 329	32
Senate Doc. No. 243, 62d Cong., 2d Sess.	16
State Tax Commission's Emergency Regulation No. 6	4

TABLE OF AUTHORITIES CITED

vii

- Studenski, Paul, and Herman E. Kroes, "Financial History of the United States" (2d ed., 1963), pp. 119-120, 137-155, 250-251, 261, 393 9n., 12, 19
- Welch, Ronald B., "State and Local Taxation of Banks in the United States," Special Report No. 7 of the State Tax Commission of the State of New York (1934), pp. 21, 36-43 41, 44
- Youngdahl, C. Richard, "Open-Market Operations," in "The Federal Reserve System," Herbert V. Prochnow ed. (1960), pp. 113, 132 20



In the Supreme Court of the United States.

OCTOBER TERM, 1967.

No. 755.

FIRST AGRICULTURAL NATIONAL BANK OF
BERKSHIRE COUNTY,
Appellant,

v.

STATE TAX COMMISSION.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF
MASSACHUSETTS.

BRIEF FOR THE STATE TAX COMMISSION.

Opinion Below.

The opinion of the Supreme Judicial Court of Massachusetts (A. 31-58) is reported at 1967 Mass. Adv. Sh. 1301, 229 N.E. 2d 245.

Jurisdiction.

The judgment of the Supreme Judicial Court of Massachusetts was entered on July 27, 1967, and a final decree was entered on August 9, 1967. Notices of appeal from the judgment and final decree were filed with the Supreme Judicial Court on October 13, 1967, and the appeal was

docketed with the Supreme Court of the United States on October 23, 1967. Probable jurisdiction was noted on January 15, 1968. The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(2).

Questions Presented.

The ultimate question is whether the Constitution and laws of the United States prohibit the Commonwealth of Massachusetts from applying a nondiscriminatory sales and use tax statute to purchases of tangible personal property by a national bank. This raises the following subsidiary questions:

- (1) Is a national bank today to be regarded as a federal instrumentality for the purpose of relieving it, on constitutional grounds, from payment of nondiscriminatory state sales and use taxes on its purchases of tangible personal property?
- (2) If it should be held that affirmative action by Congress is required for the enactment by a state of a sales tax in cases where its legal incidence falls on a national bank, is there any sufficient reason for not accepting the determination of the Massachusetts Supreme Judicial Court that the legal incidence of the Massachusetts sales tax does not fall on the bank as a purchaser, and thus raises no question of either a constitutional or a statutory immunity of a national bank from a sales tax on its purchases?
- (3) Is 12 U.S.C. § 548, to be regarded as impliedly prohibiting the Commonwealth of Massachusetts from imposing (a) its use tax on purchases of tangible personal property by national banks and (b) its sales tax on such purchases if the legal incidence of the latter tax should be regarded as falling upon a purchaser?

Statutes and Regulations Involved.

The Massachusetts Sales and Use Tax Law (St. 1966, c. 14, § 1 and § 2, as amended by St. 1966, c. 483) is set forth, in pertinent part, at page 57 et seq. of the appendix to the appellant's brief. The State Tax Commission's Emergency Regulation No. 6 is set forth at page 74 thereof. Section 548 of Title 12, U.S.C., the federal statute involved, is set forth at page 55 et seq. thereof.

Statement.

The appellant is a national bank organized under 12 U.S.C. § 21 et seq. and located in the Commonwealth of Massachusetts. The appellee is the Commonwealth's State Tax Commission. By a bill for declaratory relief (A. 2-15) filed before a single justice of the Massachusetts Supreme Judicial Court, who reserved and reported the case without decision to the full bench (A. 30), the appellant sought a binding declaration that its purchases of tangible personal property are exempt under the Constitution and laws of the United States from the Massachusetts sales and use taxes imposed by St. 1966, c. 14, §§ 1 and 2.¹ That statute exempted "Sales which the commonwealth is prohibited from taxing under the constitution or laws of the United States." Sec. 1, subsec. 6(a), and sec. 2, subsec. 5(b) (Appendix to appellant's brief, pp. 58 and 71). Nothing in the statute exempted banks as such.

The appellant's bill for declaratory relief also sought (A. 8, prayer 5) a binding declaration of the alleged in-

¹ Although a temporary statute, which expired on December 31, 1967 (§ 79), the act has since been made permanent in all respects material to this case. St. 1967, c. 757, inserting chapters 64H and 64I into the Massachusetts General Laws.

validity of Emergency Regulation No. 6 of the Commission (A. 26) that "The sale, lease or rental of tangible personal property to national banks . . . is subject to the sales and use tax."

The case was heard by the full bench of the Supreme Judicial Court on a statement of agreed facts, a "Case Stated" (A. 17-29), which contained the foregoing facts and also stipulations that there are ninety national banks in Massachusetts (A. 19); that the appellant has paid Massachusetts sales and use taxes on its purchases (A. 18); that the appellant "will be unable to carry on its banking operations unless it continues to make purchases" which, by the terms of the regulation, are subject to the sales and use taxes (A. 19); and that "Massachusetts vendors have refused to make retail sales of tangible personal property to the [appellant] unless the [appellant] agrees that it will reimburse such vendors for the Massachusetts sales tax thereon" (A. 19).

The full bench of the Massachusetts Supreme Judicial Court ruled that the appellant's purchases were subject to both the sales and the use taxes (A. 31-58). Treating the sales tax and the use tax separately, the court held, with regard to the former, that its legal incidence did not fall on purchasers, but rather on vendors, and that in consequence the bank was not entitled to an exemption on its purchases. With regard to the use tax, the court held that, even though its legal incidence falls on purchasers, a national bank was not entitled to an exemption under either the Constitution or the laws of the United States. A final decree was then entered declaring the Commission's regulation to be "valid in so far as it rules that purchases of tangible personal property by national banks are subject to the Massachusetts sales and use taxes, St. 1966, c. 14, secs. 1 and 2" (A. 60-61). This appeal followed (A. 61-62).

Summary of Argument.

The essence of the position of the State Tax Commission is that national banks today are private business enterprises and are therefore not entitled to a constitutional immunity from nondiscriminatory state sales and use taxes on their purchases; that, in any event, although the legal incidence of the Massachusetts use tax concededly falls on the banks as purchasers, the legal incidence of the Massachusetts sales tax does not, so that this case actually presents only a question of immunity from the use tax; and, finally, that 12 U.S.C. § 548 does not prohibit the imposition of the use tax and is, in any event, inapplicable in the present case to the sales tax, since its legal incidence does not fall on the appellant as a purchaser.

We begin by tracing the origin and development of national banks. The laws under which they are organized date back to the National Currency Act of 1863, an act to establish a uniform national currency and extend the market for government bonds. That measure created a national free banking system under which private parties could obtain federal banking charters by pledging government bonds with the government as security for bank notes which the government would then provide for use as a circulating medium.

The need for a larger market for government bonds was brought on by the financial burdens of the Civil War. The need for a uniform national currency had already existed for some time because of the disruptive monetary effects of the multiform, depreciated and often spurious state bank notes then in circulation. Even after the National Currency Act of 1863, these notes continued to circulate, but in 1866 they were finally eliminated by the imposition of a prohibitive tax.

The passing of the state bank notes and the creation of the national bank notes temporarily improved the nation's currency. Yet the new notes, because of their fixed connection with the government bond market, soon proved to be gravely deficient. Their chief weakness was their inelasticity; that is, their inability to expand and contract according to the changing demands of business and agriculture. By the year 1910, following a series of financial crises and panics, it was generally agreed that the national bank notes should be replaced by a more elastic currency. It was also generally agreed that there were other serious deficiencies in banking operations and structure and that fundamental reforms were required to ensure mobilization and concentration of reserves, cooperation among banks and stabilization of banking on a nationwide basis.

The Federal Reserve Act in 1913 was enacted to correct the many shortcomings of the existing banking units. It established the Federal Reserve System as a central banker and provided, among other things, for a new type of bank note currency, Federal Reserve notes, and it also provided for the eventual retirement of the national bank notes.

In 1935 the bonds that then secured the national bank notes were called for redemption, whereupon the note-issuing functions of the national banks ceased. This also marked the end, if it had not sooner occurred, of any significant banking difference between the national and the state banks.

Long before 1935, in fact, Congress and this Court had recognized the commercially competitive relationship between the national and the state banks. Powers of national banks had been enlarged to permit them to engage in banking business of the same type as that carried on by the state banks. In enlarging these powers, Congress usually

adopted the law of the states where the banks were located as the measure of the new grants of authority. Similarly, this Court, when Congress has not legislated, has held the national banks to be subject to the laws of the states where they carry on their business unless it could be demonstrated that the state laws incapacitated the banks from discharging their functions. Hence, even if national banks might *arguendo* be regarded, for some purposes, to be federal instrumentalities, they should not be given a constitutional exemption from nondiscriminatory sales and use taxes.

Actually, national banks today do not meet the tests of a federal instrumentality. None of the criteria employed in determining whether an institution qualifies as such an instrumentality are satisfied by national banks as now constituted. From whatever aspect a national bank is viewed today, it performs no significant functions for the use of the government nor does it serve as an agent to execute governmental policy.

The judicial decisions, such as *Owensboro National Bank v. Owensboro*, 173 U.S. 664, that have held national banks to be federal instrumentalities were handed down when national banks still issued bond-secured notes as currency. Moreover, they relied on *M'Culloch v. Maryland*, 4 Wheat. 316, and *Osborn v. Bank of the United States*, 9 Wheat. 738, which concerned a significantly different bank, the Second Bank of the United States. When established in 1816, the Second Bank was a true central bank designed to eliminate the acute currency disorders following the War of 1812 and to serve as the fiscal agent of the government. Whatever significance the note-issuing functions of the variety of national banks that were formed under the Civil War legislation may have had in creating some resemblance between these banks and the great Second Bank of the United States, not even that feature exists today.

Our argument next considers the legal incidence of the Massachusetts sales tax. This question is important since any constitutional or statutory immunity claimed by the appellant depends on whether it bears the legal incidence of the taxes of which it complains. Concededly, the appellant as a purchaser bears the legal incidence of the use tax.

Determination of the sales tax question depends on the Massachusetts court's decision as to what rights and liabilities the Massachusetts statute has established. In respect of these determinations, the decision is not reviewable. To the extent that any federal question is involved, it must therefore be resolved on the basis that it does not reopen the underlying construction of the statute by the state court.

After full consideration of the statute, the Massachusetts court held that the legal incidence of the sales tax does not fall on the bank as a purchaser, since only the vendor is responsible for the payment of the tax to the state. This construction, which has the effect of fixing the meaning and effect of the law in Massachusetts, fully comported with federal criteria, as established by this Court, and should be accepted as determinative of the question of the legal incidence of the sales tax on this appeal.

Finally, we consider the application of 12 U.S.C. § 548. We point out that it does not affirmatively purport to grant exemptions from state taxation of national banks, but only purports to regulate the mode of taxation of the shares thereof. We then argue that, since tax exemptions should not be implied, no exemption from a nondiscriminatory sales and use tax should be read into the statute. Denial of any implied exemption would be consistent with the original purpose underlying the enactment of section 548 in 1864 and would avoid the ironical result of using a statute that was designed to protect national banks from dis-

criminatorv taxation as a device to confer on them a special preference. Cases which have said that section 548 is the exclusive basis of the jurisdiction of the states to tax national banks have, we maintain, departed from the original understanding of Congress in adopting that section. Finally, we point out that a nondiscriminatory use tax is inherently equal as between state and national banks and does not require action by Congress or this Court to ensure its nondiscriminatory application.

Argument.

I. A NATIONAL BANK TODAY IS A STRICTLY PRIVATE BUSINESS ENTERPRISE THAT PERFORMS NO FUNCTIONS OF SUFFICIENT GOVERNMENTAL IMPORTANCE TO ENTITLE IT TO ANY CONSTITUTIONAL EXEMPTION FROM NONDISCRIMINATORY STATE SALES AND USE TAXES.

A. The Origin of National Banks and Their Once Distinctive Feature—Bond-Secured Bank Notes..

The more than 13,000 national banks today, all privately organized, owned and financed, originated in the financial bewilderment of the Civil War.¹ The charter of the Second Bank of the United States having expired in 1836 and no federally chartered bank having been created as a successor, banking at the outbreak of the War was wholly in

¹ For the origin of the national banks see Andrew MacFarland Davis, "The Origin of the National Banking System," National Monetary Commission (1910); Paul Studenski and Herman E. Kroos, "Financial History of the United States" (2d ed., 1963), pp. 137-155; Thomas J. Anderson, Jr., "Federal and State Control of Banking" (1934), pp. 53-88; Bray Hammond, "Historical Introduction," in "Banking Studies," Federal Reserve System (1941), pp. 10-14. For current statistics on the numbers and types of banks see Annual Report of the Comptroller of the Currency for 1965-1966, p. 13.

the hands of state institutions. Although the country was nominally on a specie basis, the amount of specie in circulation was insignificant, and was even further reduced in December, 1861, when the state banks and then the federal government itself, as Union finances deteriorated, suspended specie payments. Acute need for funds to support the War quickly brought about the enactment of the Legal Tender Act on February 25, 1862 (12 Stat. 345), to authorize the issue of government notes or greenbacks, but these proved to be a weak, and soon a depreciated, support for the North's money.

A major portion of the circulating currency and of the total stock of money, both before and after the issue of the greenbacks, consisted of state bank notes. Commercial banking was still at that early and crude state of development, in theory and practice, at which the issuance of bank notes rather than the creation and transfer of demand deposits and the distribution of credit was its distinctive feature. See Henry E. Miller, "Banking Theories in the United States before 1860" (1927), pp. 12, 14. In 1862 there were 1,600 state banks issuing 7,000 varieties of notes, plus 3,000 varieties of altered notes, 1,700 varieties of spurious notes, and 800 varieties of imitations. Davis R. Dewey, "Financial History of the United States" (12th ed., 1936), p. 322. The notes had no standard value, some passing at par, others at a discount, others for nothing.

The chaotic condition of the state bank notes and the need for reform were described in picturesque terms by a contemporary observer:

"In the West the people have suffered for years from the issues of almost every State in the Union, much of which is so irredeemable, so insecure, and so unpopular as to be known by opprobrious names rather than the money it pretends to represent. There the frequently

worthless issues of the State of Maine and of other New England States, the shinplasters of Michigan, the wild cats of Georgia, of Canada, and Pennsylvania, the red dogs of Indiana and Nebraska, the miserably engraved notes of North Carolina, Kentucky, Missouri, and Virginia, and the not-to-be-forgotten stumptails of Illinois and Wisconsin are mixed indiscriminately with the fair currency of New York and Boston, until no one can wonder that the West has become disgusted with all bank issues and almost unanimously demand that such a currency shall be taxed out of existence, and give place to a uniform national currency." Quoted in Andrew MacFarland Davis, "The Origin of the National Banking System," National Monetary Commission (1910), p. 14.

Counterfeiting of the state bank notes was a major source of monetary insecurity. A contemporary observer reported:

"One phase of our paper currency engendered by this multiform system calls for special notice and consideration. We refer to counterfeiting. It may be safely stated that the art, as pursued in the United States, is without parallel, and that without vaunt or hyperbole, we can 'beat the world' on this, our national specialty—counterfeiting. A species of literature, even unknown to the rest of the world, has been initiated among us, and no merchant or mechanic deems himself safe unless he consults the 'Counterfeit Detector,' . . ." Quoted in Davis, "The Origin of the National Banking System," *supra*, p. 25.

Proposals that Congress eliminate the currency chaos began, it may be said, with a report by Secretary of the

Treasury Salmon P. Chase in December, 1861, urging the creation of a uniform national currency. It was not until February, 1863, however, that Congress acted. Merging in one measure the double objective of creating a uniform national currency and extending the market for government bonds, sorely needed at that time in place of more greenbacks, to finance the Civil War, Congress passed "An Act to provide a national Currency, secured by a Pledge of United States Stocks, and to provide for the Circulation and Redemption thereof" (Act of February 25, 1863, c. 58, 12 Stat. 665, soon amended and replaced by the Act of June 3, 1864, c. 106, 13 Stat. 99). This act, called the National Currency Act, to give it its correct name, established a national free banking system by which five or more private persons could, upon satisfying certain capital requirements and depositing a specified amount of United States bonds with the Comptroller of the Currency, receive a federal charter "to carry on the business of banking" (§ 8) in their local community (§§ 5, 7, 14, 16; references are to the 1864 version). Against the security of the deposited bonds, which were limited to certain issues and were accordingly said to have the circulation privilege, the Treasurer of the United States was to issue as obligations of a depositing bank circulating notes equal to 90 per cent of the lesser of the par or market value of the bonds (§ 21). These notes were receivable for all debts, other than import duties, owed to the United States (§ 23). Each bank was eligible upon posting certain security to be a depository of federal funds (§ 45). However, the Independent Treasury System, which had been established in 1846, continued to exist side by side and to be a depository for the government's funds. Not until 1921 was it abolished. (See Paul Studenski and Herman E. Kroos, "Financial History of the United States" (2d ed., 1963), pp. 119-120, 250-251, 261.)

Although the National Currency Act allowed state banks to obtain federal charters, the state banks, preferring their state parentage, were slow to convert. In consequence, notes of state banks, with all their former irregularities and unsettling influences, continued to circulate alongside the bond-secured notes of the new federally chartered banks. When it became clear that the state banks would not voluntarily seek federal charters, steps were taken to compel them to do so. Taxation was the device employed. To drive the state bank notes into retirement and to force the state banks, thus deprived of their distinctive function, to convert to federal charters, the Act of July 13, 1866, c. 184, 14 Stat. 98, taxed the notes at the prohibitive rate of 10 per cent (§ 9). (See *Veazie Bank v. Feno*, 8 Wall. 533, upholding the tax.) The tax was successful in forcing the notes into retirement, but it nevertheless failed to eliminate the state banks. A number of the banks, it is true, converted at first, but soon the rapid development of demand deposits as the distinctive feature of commercial banking, together with an expanded role for banks as fiduciaries, opened new areas of profitable banking activity. In consequence, the state banks were not only able to survive; they increased and expanded and became vital elements in the country's banking structure.

The growth of deposit banking after the Civil War has been described by two scholars:

"In 1867, the public divided its stock of money almost equally between deposits and money: it held about \$1.20 of deposits for each dollar of currency . . . In the five years after 1867, deposits rose to \$2 for each dollar of currency. That increase reflects the rapid post-Civil War growth and spread of commercial banking." Milton Friedman and Anna J. Schwartz, "A Monetary History of the United States 1867-1960" (1963) p. 16.

B. The Decline of the National Bank Notes.

The passing of the state bank notes and the creation of national bank notes represented a major improvement in the composition of the nation's currency. Yet within the new system lay the seeds of its own destruction. The essential defect was tying the amount of bank note currency to the condition of the government bond market and failing to consider the critical credit requirements of business and agriculture. This defect, which made the national bank notes extremely inelastic and even created what has been called "perverse elasticity," prevented the volume of bank notes from increasing or decreasing according to the public's demand for credit. When business was good and an increase in bank note circulation was desirable, the price of government bonds tended to rise, discouraging banks from buying more bonds as a base for further bank note issues. On the other hand, when business was bad and a contraction of the amount of currency was warranted, the price of government bonds declined, encouraging banks to buy more bonds, which then became the base for augmenting an already redundant currency.

This unresponsiveness of the national bank notes to the varying needs of trade and industry, along with other defects of the national banking system—the failure to provide either an adequate discount market for commercial paper, or an adequate system of mobile and centralized bank reserves or an adequate system of check clearance—not only rendered the national banks gravely ineffective in meeting the public's need for credit and banking facilities; it also tended to accentuate the all too frequent financial crises with which the economy was periodically confronted. Although it might be an overstatement to assert that the deficiencies in the national banking system brought on the panics of 1873, 1884, 1893 and 1907, it could, we submit,

correctly be said that these deficiencies intensified each of these crises after they began.

By the year 1910 it had become plain to every student of the subject that national bank notes should be replaced by another form of currency. As one scholar wrote in that year:

"The sum of the whole matter is that under the existing system of bank notes based upon government bonds, normal and automatic expansion and contraction of the currency, in response to needs of trade, is flatly impossible. The currency supply may be greatly enlarged in the dull midsummer months and suddenly contracted when the active autumn business season begins. It may increase rapidly, at a time when trade reaction has reduced to a minimum the necessities for even the existing bank note supply, or it may be as rapidly reduced when large harvests, full employment of labor, and active hand-to-hand use of currency, most need a larger circulating medium. That there is no remedy for this abnormal situation, except the substitution of some other system for that which prescribes the United States Government bond as a basis for bank note issues, every economist at all familiar with the question agrees. It is only when discussion converges on the system which is to be substituted, that difference of opinion is encountered." Alexander D. Noyes, "History of the National-Bank Currency," National Monetary Commission (1910), p. 20.

C. The End of the National Bank Notes.

Certain ineffectual steps had already been taken in 1900 and 1908 to bolster the now discredited national bank note currency. The Currency Act or Gold Standard Act of 1900 (Act of March 14, 1900, c. 41, 31 Stat. 45) authorized, among

other things, national bank notes to be issued up to the full par value of the bonds deposited as their security, instead of 90 per cent as previously (§ 12), and it also reduced the circulation tax to which such notes were then subject (§ 13). In 1908 the Aldrich-Vreeland Act (Act of May 30, 1908, c. 229, 35 Stat. 546) made further changes by authorizing groups of national banks to form national currency associations through which the banks could issue an "emergency currency," as it came to be called, upon the security of 90 per cent of the market value of certain state and local bonds and up to 75 per cent of the cash value of other securities or commercial paper (§ 1). Authority for such issues was to expire on June 30, 1914 (§ 20). Foreshadowing a thorough revision of the country's banking structure, the act established a National Monetary Commission to study and make recommendations relative to the nation's money and banking system (§§ 17-19).

On January 9, 1912, following the publication of more than twenty volumes of scholarly studies of banking institutions and practices, both in the United States and abroad, the Commission filed its report (Senate Doc. No. 243, 62d Cong., 2d Sess.). The existing banking structure was indicted, to cite only some of the grounds, for its failure to provide for the concentration and mobilization of reserves, its inability to adjust to fluctuations in the demand for credit, its failure to provide for effective cooperation among banks, its failure to provide a broad discount market for commercial paper, and its failure to coordinate and stabilize banking functions and resources on a nation-wide basis (*ibid.* pp. 6-9). Among the gravest of the deficiencies found in the existing system was the national bank note currency. Of this the Commission said:

"Of our various forms of currency the bank-note issue is the only one which we might expect to respond

to the changing needs of business by automatic expansion and contraction, but this issue is deprived of all such qualities by the fact that its volume is largely dependent upon the amount and price of United States bonds." (Ibid. p. 7.)

The Commission also criticized the existing system of keeping government funds in the erratic Independent Treasury System, which tended to be a disruptive influence through its sudden and irregular additions and withdrawals. Supplemental use of national banks as depositories had resulted in charges of discrimination and favoritism (ibid. p. 9).

Included in the report were recommendations for broad and pervasive changes. Especially pertinent to the present case was a proposal that the national banks should not issue any more bank notes (ibid. p. 17).

This and the other recommendations led in the following year to the enactment of the Federal Reserve Act, "An Act to provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes" (Act of December 23, 1913, c. 6, 38 Stat. 251).

The general structure of the Federal Reserve System is too familiar to be described here. We call the Court's attention, however, to certain provisions of the Federal Reserve Act which underscore the decline in the relationship of national banks to the government. Acknowledging the failure of the national bank notes and deciding to tamper with them no longer, the new act created a new kind of bank currency, Federal Reserve notes. Each Federal Reserve Bank was authorized to issue these new notes upon the security of 100 per cent commercial paper and a reserve

of 40 per cent gold or gold certificates, including a 5 per cent redemption fund (§ 16). Each such bank was also authorized to buy and sell government obligations (§ 14b). Also pertinent was a section which authorized the Treasurer of the United States to deposit public funds in the Federal Reserve Banks, "which banks, when required by the Secretary of the Treasury, shall act as fiscal agents of the United States; . . ." (§ 15).

Were it not for the danger of unduly contracting the currency and subjecting the national banks to losses on certain government bonds which had the circulation privilege and thereby had a value far above their investment value, the Federal Reserve Act would in all likelihood have ended the existence of national bank notes in 1913. Edwin W. Kemmerer, "The ABC of the Federal Reserve System" (11th ed., 1938), p. 61. However, to allow an orderly liquidation of the national bank notes and their supporting security, the Federal Reserve Act provided instead that, if national banks desired to sell their pledged bonds, the Federal Reserve Board should direct the Reserve Banks to purchase them, up to certain limits each year after 1915, whereupon the notes were to be retired (§ 18). It was expected that this process would take about twenty years (Davis R. Dewey, "Financial History of the United States" (12th ed., 1936), p. 493). Eventually, after some fluctuations in the supply, it was completed. On March 11, 1935, the Secretary of the Treasury called for redemption all the bonds then possessing the circulation privilege. Each national bank was required to deposit with the Secretary the proceeds of its redeemed bonds, to hold as a fund to redeem the notes which the bonds had secured. The Treasury, in turn, assumed, as a noninterest-bearing obligation of the United States, the bank notes to which the redeemed bonds pertained. Thereafter as these notes, which had then ceased to be obligations of the national banks, were received by the

Federal Reserve Banks in the usual course of business, they were delivered to the Treasury and retired (see Annual Report of the Board of Governors of the Federal Reserve System for 1935, pp. 27-28). The redemption of the bonds possessing the circulation privilege meant, of course, that national banks could not thereafter issue any new bank notes.

The passing of the national bank notes evoked no laments. It "eliminated a concentrated headache which had existed since 1863 . . ." Paul Studenski and Herman E. Kroos, "Financial History of the United States" (2d ed., 1963), p. 393. It was "[o]ne phase of the Roosevelt Administration's currency policies with which no monetary economist can find fault . . . The various shortcomings of the national bank notes, such as inelasticity, perverse elasticity, and the like, are too familiar to require comment. . . ." James D. Paris, "Monetary Policies of the United States, 1932-1938" (1938), p. 90.

The abolition of the national bank notes meant the end of any significant difference between national and state banks. It has been said:

"With the passing of the national bank notes, the United States lost much of the difference between the national banking system and the state banking systems. Except for automatic membership in the Federal Reserve System, different examining boards, and more or less different standards of examination, appraisal and the like, the main point of differentiation between the national banking system and any strict banking system, as in New York State, was formerly the privilege of currency issue." James D. Paris, *supra*, p. 96.¹

¹ Cf. *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41, 48.

It is of interest also to record that eventually the Federal Reserve System itself ceased to have any official function in stabilizing the government securities market. On March 4, 1951, following the inflationary pressures of the Korean War, a conflict between the credit-control responsibilities of the Board of Governors of the Federal Reserve System and the debt-management responsibilities of the Treasury brought about the famous Accord which marked the end of the Federal Reserve System's support of the government securities market. Annual Report of the Board of Governors of the Federal Reserve System for 1951, pp. 3, 98; Annual Report of the Secretary of the Treasury for the Fiscal Year Ended June 30, 1951, p. 271; C. Richard Youngdahl, "Open-Market Operations," in "The Federal Reserve System," Herbert V. Prochnow ed. (1960), pp. 113, 132.

D. Both Congress and This Court have Encouraged Competitive Equality between State and National Banks; under This Doctrine Neither Class of Banks Receives Any Special Favor.

Development of state banks alongside the national banks has created what is generally known as the dual banking system. This term today, however, scarcely describes with accuracy the complex and comprehensive controls to which banks are now subject. If it is intended to suggest that state banks are not subject to federal control, it is highly erroneous. Few state banks, whether or not they are members of the Federal Reserve System, are not subject to some form of supervision by the Comptroller of the Currency, the Federal Reserve System, and the Federal Deposit Insurance Corporation. Howard H. Hackley, "Our Baffling Banking System," 52 Virginia L. Rev., pp. 565,

771, 814 (May and June, 1966). Yet the term "dual banking system" sufficiently indicates that state banks hold state charters and national banks hold federal charters.

Rivalry between the two classes of banks has engendered numerous equalizing amendments to the National Bank Act (the act by which the original National Currency Act is now known (12 U.S.C. § 38)). Without authority to loan upon the security of real estate until 1913, national banks were authorized in that year to loan on improved farmland (§ 24 of the Federal Reserve Act). This power was expanded in 1916 to include certain other classes of real estate (Act of September 7, 1916, 39 Stat. 752), and then, in 1927, by the McFadden Act, it was extended without restriction to all improved real estate. Act of February 25, 1927, c. 191, 44 Stat. 1224, § 16.

Power to act as a fiduciary was first given to national banks in 1913 by the Federal Reserve Act (§ 11(k)), amended by the Act of September 26, 1918, c. 177, 40 Stat. 967, § 2. The McFadden Act, *supra*, authorized branch banking (§ 7) (see *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261), liberalized requirements for capitalization (§ 4), and authorized payment of interest on deposits (§ 16).

In expanding the powers of national banks, Congress has often assimilated the new powers to those possessed by state banks in the particular states where the national banks are located. Examples of the adoption of state law are found in the provisions relative to branches (12 U.S.C. § 36(c)); capitalization (12 U.S.C. § 51); interest rates (12 U.S.C. § 85); conversion of charters from federal to state and vice versa, and mergers (12 U.S.C. § 214c); contributions to charity (12 U.S.C. § 24 (eighth)); and receiving deposits of public moneys (12 U.S.C. § 90; see *Lewis v. Fidelity & Deposit Co. of Maryland*, 292 U.S. 559). Further,

Congress has authorized the states to regulate bank holding companies involving both national and state banks (12 U.S.C. § 1846).

In cases where Congress has not explicitly made national banks subject to state law, judicial decision has often done so. Examples are found in cases involving the escheat of abandoned bank deposits, *Anderson National Bank v. Luckett*, 321 U.S. 233; setting aside preferences by an insolvent debtor, *McClellan v. Chipman*, 164 U.S. 347, and branch banking, *First National Bank in St. Louis v. Missouri*, 263 U.S. 640 (a case arising before the McFadden Act). As stated in *Anderson National Bank v. Luckett*, *supra*:

"This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." (p. 248.)

Earlier this Court, in a tax case, stated the foregoing doctrine in these words:

"They [the national banks] are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." *National Bank v. Commonwealth*, 9 Wall. 353, 362.

A like test was enunciated by this Court in *First National Bank in St. Louis v. Missouri*, 263 U.S. 640:

"[N]ational banks, are subject to the laws of a State in respect of their affairs unless such laws interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States." (p. 656.)

The appellee respectfully submits that under the foregoing criteria a national bank (assuming *arguendo* that for some purposes it may be regarded as a federal instrumentality) cannot successfully assert a constitutional immunity either from a nondiscriminatory state use tax on its purchases or, if the legal incidence of a sales tax should fall upon it, from a nondiscriminatory sales tax either. Such taxes fall equally on all purchasers. To assert that a national bank's payment of these taxes would "impose an undue burden on the performance of the banks' functions" (*Anderson National Bank v. Luckett, supra*, at p. 248) or would incapacitate the banks from discharging their duties, if any, to the federal government (*National Bank v. Commonwealth, supra*, at p. 362) or would "tend to impair or destroy their efficiency as federal agencies [assuming them to be such]" (*First National Bank in St. Louis v. Missouri, supra*, at p. 656) is, we submit, refuted by the mere statement of the proposition. To sanction an exemption from such taxes today would ignore the wholly private commercial character of a national bank and would amount to a rejection of the historic doctrine of competitive equality. The granting of such an exemption would be nothing less than the award of an inequitable preference to a favored class of business enterprise. In today's bank-

ing world, moreover, it would raise serious questions of a denial of equal protection of the laws. It would also ignore the many decisions of this Court on what the necessary elements of a federal instrumentality are.

E. A National Bank Today does Not Meet the Tests of a Federal Instrumentality.

Although it is true that "there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality" (*Department of Employment v. United States*, 385 U.S. 355, 358-359), the criteria that have been employed by this Court in recent years would, we submit, plainly exclude national banks, as they are now constituted, from being so regarded. Various formulations of the controlling criteria have been adopted—whether the institutions "have been so incorporated into the government structure as to become instrumentalities of the United States" (*United States v. Boyd*, 378 U.S. 39, 48, involving a private contractor); whether the institutions "are integral parts of [a governmental department and] share in fulfilling the duties entrusted to it" (*Standard Oil Co. of California v. Johnson*, 316 U.S. 481, 485, involving Army post exchanges); or are "assimilated by the Government as to become one of its constituent parts" (*United States v. Township of Muskegon*, 355 U.S. 484, 486, involving a private contractor using government property); or whether the institution is regarded "virtually as an arm of the Government" (*Department of Employment v. United States*, *supra*, at pp. 359-360, involving the Red Cross).

Each institution is judged on its own facts, and national banks today should be no exception. The mere fact that an institution holds a federal charter does not entitle it to

enjoy the status of a federal instrumentality. *Railroad Co. v. Peniston*, 18 Wall. 5, 36. Similarly the holding of a permit from the federal government does not give a business enterprise an official status. *Broad River Power Co. v. Query*, 288 U.S. 178. To be eligible for such a special position, an institution must establish that its exclusive or at least its dominant aim is to perform a function that the government, but for the existence of the institution, would in all likelihood be required to perform itself. This we believe to be the true teaching of the cases decided by this Court. See *Clallam County v. United States*, 263 U.S. 341, 345; *Standard Oil Co. of California v. Johnson*, 316 U.S. 481; *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95; *Department of Employment v. United States*, 385 U.S. 355. It is, as we shall attempt to demonstrate in a subsequent part of this brief, the true teaching of *M'Culloch v. Maryland*, 4 Wheat. 316.

Although the facts of each case are different, we note some of the characteristics which this Court has regarded as relevant to the determination of whether an institution is to be regarded as a federal instrumentality: Is it organized for private profit? (*United States v. Township of Muskegon*, 355 U.S. 484, 486); is it a servant of the United States in agency terms? (ibid. p. 486); is it organized only for the convenience of the United States to carry out its ends? (*Clallam County v. United States*, 263 U.S. 341, 345); is it organized to effectuate a specific governmental policy? (*Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 102, wherein it was stated that "Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers"); do governmental officials handle its finances and in fact control its operations? (*Standard Oil Co. of California v. Johnson*, 316 U.S. 481, involving Army post exchanges); are its of-

ficials or any significant portion of them appointed by the government? (*Department of Employment v. United States*, 385 U.S. 355, 359); does the government give it financial aid? (*ibid.*); is it charged by law with carrying out the government's international commitments? (*ibid.*); does it perform functions indispensable to the working of the Armed Forces? (*ibid.*).

The foregoing catalog is not intended to be exhaustive but it does, we submit, indicate the kinds of facts that must be present today to entitle an institution to enjoy the special status of a federal instrumentality. Ultimately, in each case, all facts must be examined in the light of a standard, and that standard, we submit, has as one of its essential elements the discharge of a peculiarly governmental function. Application of that standard, in turn, necessitates a detailed analysis of the purpose and character of the legislation on which the particular claim for an exemption relies. *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 578.

If national banks could at any time have been regarded as discharging a governmental function, their role in that regard has now plainly come to an end. They no longer issue or support any currency or provide an assured market for government bonds, and they do not now provide, if they ever did, any significant fiscal services to the government. Today any bank, federal or state, may be a government depository (12 U.S.C. § 265). The principal checking accounts of the government are carried today, not by national banks, but rather by the Federal Reserve Banks. When a new issue of government securities is offered, the Federal Reserve Banks receive the applications of interested purchasers. When government securities are to be redeemed or exchanged, the transactions are handled by the Federal Reserve Banks. These same banks administer

for the Treasury the tax and loan deposit accounts of the banks in their respective districts. See Board of Governors of the Federal Reserve System, "The Federal Reserve System—Purposes and Functions" (5th ed., rev. 1967), pp. 274-277. The functions of national banks, on the other hand, are merely the usual functions of other privately owned and managed commercial banking institutions.

That national banks have a distinctively private character is now recognized in both anti-trust and labor law. See *United States v. Philadelphia National Bank*, 374 U.S. 321 (anti-trust); *United States v. First National Bank & Trust Co. of Lexington*, 376 U.S. 665 (anti-trust); *National Labor Relations Board v. Bank of America National Trust & Savings Association*, 130 F. 2d 624 (9th Cir.) (labor law). And it is also recognized in federal taxation, national banks being subject to the federal income tax law (26 U.S.C. § 581, 26 C.F.R. § 1.581-1).

F. Owensboro National Bank v. Owensboro, 173 U.S. 664, is Not a Valid Precedent Today:

On the basis of the foregoing considerations, it is difficult to see how a national bank today can be regarded as a federal instrumentality. Any such holding today must rely on the originally questionable and now eroded case of *Owensboro National Bank v. Owensboro*, 173 U.S. 664, decided in 1899, in which this Court, at pp. 667-668, quoted with approval a statement in *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283, in 1895, that "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." These principles, the Court said in *Owensboro* (p. 667), were "settled" in *M'Culloch v. Maryland*, 4 Wheat. 316, and *Osborn v. Bank of the United States*, 9 Wheat. 738.

Whatever may have been the validity of the statement in *Davis* in 1895 or its restatement in *Owensboro* in 1899 that "National banks are Federal instrumentalities," the events since that time, which we have already related, completely refute its applicability today. Even in the last decade of the nineteenth century, we suggest, it was of doubtful validity.

M'Culloch v. Maryland, and *Osborn v. Bank of the United States*, on which *Owensboro* relied, related, of course, to the Second Bank of the United States, a wholly different institution from the congeries of isolated, uncoordinated banks organized under the National Currency Acts of 1863 and 1864. The Second Bank was chartered by Congress in 1816 following a period of financial chaos after the War of 1812. The charter of the First Bank of the United States having expired in 1811, there was no bank possessing a federal charter. Banking was carried on entirely by state institutions, each of which issued as currency its own varieties of bank notes. The banks were too easily organized and too lightly supervised; they were undercapitalized, badly and often corruptly managed, and lacking in sufficient reserves. Their underpinnings crumbled when the shock of the British raid on Washington in 1814 brought on a general run for specie. Unable to meet the demand, all banks, except in New England, suspended specie payments in August and September of that year. Bray Hammond, "Banks and Politics in America from the Revolution to the Civil War" (1957), p. 227:

Hoarders collected the remaining specie, leaving no common circulating medium in general use. In consequence, the country's monetary and banking system fell into acute disorder and nearly collapsed. Bank notes, if they passed at all, did so at varying and uncertain discounts, both from state to state and from place to place within the same state.

The effect on the government's finances was disastrous. ". . . [T]he administration failed to redeem treasury notes at Boston, Philadelphia, and New York; it actually paid some of its soldiers in bank notes which were not receivable in discharge of taxes; it could not obtain funds 'to defray the current ordinary expenses of the different departments.' [reference omitted.] The State Department was unable to discharge its stationery bill; the 'treasury was obliged to borrow pitiful sums which it would disgrace a merchant in tolerable credit to ask for;' [reference omitted]; the War Department could not pay a bill for \$3,500; 'the paymaster was unable to meet demands for paltry amounts—not even for \$30;' [reference omitted]. . . ." Ralph C. H. Catterall, "The Second Bank of the United States" (1903), p. 6.

It was plain that a new central bank was needed. Yet it was not until 1816 that Congress passed and President Madison approved a bill to create one. Passage of the bill had been spurred by messages of both the President and the Secretary of the Treasury, Alexander J. Dallas, and also by the leadership of John C. Calhoun in the House. On December 5, 1815, Madison in his annual message to Congress had said: "It is . . . essential to every modification of the finances, that the benefits of a uniform national currency should be restored to the community . . . If the operation of the State banks cannot produce this result, the probable operation of a national bank will merit consideration." Quoted in M. St. Clair Clarke and D. A. Hall, "Legislative and Documentary History of the Bank of the United States" (1832), p. 609.

Secretary Dallas was more emphatic than the President in urging the creation of a national bank. He maintained that "[t]he establishment of a national bank is regarded as the best and perhaps the only adequate resource, to re-

lieve the country and the Government from the present embarrassments . . . A national bank will . . . possess the means and opportunity of supplying a circulating medium, of equal use and value in every district of every State. Established by the authority of the Government of the United States; accredited by the Government, to the whole amount of its notes in circulation; and entrusted as the depository of the Government, with all its accumulations of the public treasure; the national bank, independent of its immediate capital, will enjoy every recommendation which can merit and secure the confidence of the public" (ibid. pp. 612-613).

Representative John C. Calhoun gave his strong support to Secretary Dallas's proposal. On February 26, 1816, he addressed the House at length, saying that he "proposed to examine the cause and state of the disorders of the national currency, and the question whether it was in the power of Congress, by establishing a national bank, to remove those disorders" (ibid. p. 630). The "state of the currency," he observed, "was a stain on the public and private credit" (ibid. p. 631). He then proceeded to analyze its grave deficiencies and to consider the ways in which they might be remedied. A national bank, he concluded, was the answer. Such a bank, he said, "paying specie itself, would have a tendency to make specie payments general, as well by its influence as by its example. It will be in the interest of the national bank to produce this state of things . . ." (ibid. p. 633). "The restoration of specie payments," he said, "would remove the embarrassments on the industry of the country, and the stains from its public and private faith."

Calhoun's efforts proved to be successful in securing passage of the bill. On April 10, 1816, President Madison signed it, and the now famous Second Bank of the United

States was born. 3 Stat. 266. "It was," as a leading financial historian has written, "a central bank in every sense of the word. It acted as the Federal Government's fiscal agent, issued notes, and dealt in bills of exchange. Its power to issue notes gave the Bank some control over the money supply, for it could increase or reduce the amount of money it issued." Herman E. Kroos, "The Historical Background of the American Banking System," in "The Federal Reserve System," Herbert V. Prochnow ed. (1960), pp. 1, 7.

The new bank was intimately connected with the government. The government was to subscribe to \$7 million of the bank's \$35 million capital (§ 1); the government's subscription could be made in "public stock" (§ 6); the Treasury was given a right of first refusal on the sale by the bank of government stocks (§ 5); the bank was to pay the government a bonus of \$1.5 million in three equal annual installments (§ 20); five of the bank's twenty-five directors were to be appointed annually by the President of the United States with the advice and consent of the Senate (§ 8); the bank's notes were legal tender for all payments to the government (§ 14); government funds were required to be deposited in the offices of the bank or its branches unless the Secretary of the Treasury, for reasons that he was to submit to Congress, directed otherwise (§ 16); and the bank was required to furnish, without charge, "the necessary facilities for transferring the public funds from place to place within the United States, or the territories thereof, and for distributing the same in payment of the public creditors" (§ 15). Finally, Congress contracted that, except in the District of Columbia, "no other bank shall be established by any future law of the United States during the continuance of the corporation hereby created, for which the faith of the United States is hereby pledged" (§ 21).

This, then, was the Second Bank of the United States which came before this Court in *M'Culloch v. Maryland*, 4 Wheat. 316, and *Osborn v. Bank of the United States*, 9 Wheat. 738. Like the First Bank of the United States, it was, to use Alexander Hamilton's words in projecting his plan of the earlier institution, "not a mere matter of private property, but a political machine of the greatest importance to the State." ("Second Report on the Further Provision Necessary for Establishing Public Credit" in "The Papers of Alexander Hamilton," Harold C. Syrett (ed. 1963), pp. 305, 329.)

Little do we wonder, then, that Chief Justice Marshall, in *M'Culloch v. Maryland*, summarily said of the Second Bank of the United States "That it [the Bank] is a convenient, a useful, and essential instrument in the prosecution of its [the government's] fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity . . . The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government" (pp. 422-423). Recalling the financial chaos that had followed the failure to renew the charter of the First Bank, Marshall said: "The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law" (p. 402).

This was about all Marshall said of the bank's connection to the government. But, considering the recent financial chaos from which the bank had emerged, further statement or analysis was unnecessary. So plain was it to Marshall

that the bank was an "essential instrument in the prosecution of its [the government's] fiscal operations, . . ." (p. 422).

Marshall's almost axiomatic acceptance of the bank's governmental role was challenged in *Osborn v. Bank of the United States*, 9 Wheat. 738, which struck down as unconstitutional a tax of \$50,000 a year imposed by Ohio on each of the bank's offices in that state. To the claim of the bank's constitutional immunity, the tax collector replied that the bank "originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object" (p. 859).

Marshall rejected this contention. "The bank," he said, "is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes" (p. 860). "The operations of the bank," he continued, "give its value to the currency in which all the transactions of the government are conducted. . . . The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. . . . Were the Secretary of the Treasury to be authorized by law to appoint agencies throughout the Union, to perform the public functions of the Bank, and to be endowed with its faculties as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the States as the Bank, and not more so" (p. 863). Continuing, he said, taking judicial notice of the government's financial problems, "That the [bank's] exercise of these [its banking] faculties greatly facilitates the fiscal operations of the government, is too obvious for controversy; . . . The currency which it circulates, by means of its trade with individuals, is believed to make it

a more fit instrument for the purposes of government, than it could otherwise be; . . ." (p. 864).

Such, then, was the original character of the great central bank that *Owensboro* relied on to support the conclusion that the isolated, uncoordinated federally chartered unit banks in 1899 were to be treated as federal instrumentalities. Questionable as the cases on the great Second Bank of the United States were as precedent for *Owensboro* in 1899, they are, we submit, so far as concerns the status of national banks as federal instrumentalities today, wholly inapplicable.

We recognize that, since *Owensboro*, cases have quoted its broad and easy doctrine. Yet in none of the succeeding cases, save the present one and the case of *Liberty National Bank & Trust Company v. Buscaglia*,—N.Y.—, —N.E. 2d—(Docket No. 203, Ct. of App., Dec. 29, 1967), has a court undertaken to re-examine the premises on which it rested. And, in each of these cases, unanimous courts found the premises to be completely eroded.¹

We are aware of the dictum in *Department of Employment v. United States*, 385 U.S. 355, 360, that "the Red Cross is like other institutions—e.g., national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute." "Beyond dispute" perhaps because of a bland acceptance of *Owensboro*. "Beyond dispute" perhaps because the appellant's brief in *Department of Employment*, in seeking to distinguish the Red Cross from genuine federal instrumentalities, conceded that "national banks are instrumentalities of the United States" (appellant's brief in *Department of Employment*, p. 25). Hence,

¹ Reexamination of the constitutional basis of the supposed immunity of national banks has been recommended by a leading authority on banking law. Howard H. Hackley, "Our Baffling Banking System," 52 Virginia Law Review, pp. 565, 771 (May and June, 1966) at p. 827.

not only was this Court not presented with any question of the correctness of *Owensboro*, it was actually requested by the state to assume that *Owensboro* was still good law. We do not join in that request. Rather, we urge the court to hold that a national bank today is a strictly private business enterprise that performs no functions of sufficient governmental importance to entitle it to any constitutional exemption from nondiscriminatory state sales and use taxes.

II. THE DETERMINATION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT THAT THE LEGAL INCIDENCE OF THE SALES TAX IS ON THE VENDOR IS A BINDING DETERMINATION UNDER STATE LAW AND IS IN ACCORD WITH FEDERAL CRITERIA.

As the decision of the Massachusetts Supreme Judicial Court pointed out, any constitutional or statutory exemption that the appellant may claim "will be controlled by whether the purchaser or the vendor bears the legal incidence of the Massachusetts sales and use taxes" (A. 36). Concededly the incidence of the use tax is on the purchaser (A. 40). The incidence of the sales tax, however, as the Massachusetts court determined, is on the vendor. This, we submit, is a determination that should be accepted on the present appeal.

We recognize, as the appellant has argued (appellant's brief, pp. 41-45) that the United States Supreme Court is not bound by the "characterization" that a state court gives to its tax law when federal rights are involved. However, as *Society for Savings in Cleveland v. Bowers*, 349 U.S. 143, points out, the United States Supreme Court "would be bound by the state court's decision as to what rights and liabilities . . . [the] statute establishes under state law" (p. 151).

The Massachusetts court has determined what these rights and liabilities are. It held that neither the provi-

sion (subsection 3 of section 1) that "each vendor in this Commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax," nor subsection 23 that prohibits as unlawful advertising the holding out by any vendor that he will assume or absorb the tax "singly or together, imposes any sanction on a vendor who chooses not to charge the tax" (A. 38-39).

The foregoing determination, we submit, is not subject to review in this case. It is a determination of rights and obligations under the law of Massachusetts only. Hence, it is not now open to the appellant to reargue whether Massachusetts law imposes any sanction for failure to add the tax to the sales price or to collect it from the purchaser (appellant's brief, p. 45 et seq.). Nor is it open to the appellant to reargue (appellant's brief, p. 46 et seq.) that subsection 7 of section 1 of the sales tax was not adequately considered in the Massachusetts court's opinion. Subsection 7 was in fact considered by the Massachusetts court (A. 37, footnote 8), but did not in any way alter the court's determination that the Massachusetts statute does not impose any sanction on the vendor who chooses not to charge the tax.

The Massachusetts court also made other determinations of rights and liabilities that the sales tax statute established under Massachusetts law. The court held that on some sales (not in excess of eighteen cents) the purchaser does not reimburse the vendor, and that the responsibility for payment to the Commonwealth is exclusively on the vendor (A. 37); that the vendor is the person to make returns and to pay the tax to the Commonwealth (A. 37-38); that assessment and collection of unpaid taxes through both criminal and civil remedies may be made only against the vendor (A. 38); that tax-abatement procedures are applicable only to vendors (A. 38); and that the Massachusetts

statute makes no provision permitting the Commonwealth to enforce the payment of the tax against a purchaser (A. 38).

Based on all the foregoing determinations, the Massachusetts court then ruled, quoting *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110, 121-122, that the legal incidence of the sales tax is on the vendor (A. 40) in that the vendor "is responsible . . . for payment to the state of the exaction" (A. 36). Since this determination has an independent state significance, namely the state's method of enforcement of its own tax, it is not subject to review, in relation to that aspect, on the present appeal. *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99.

If there is any federal aspect of the matter, it is only whether the Massachusetts court employed criteria that conflicted with the Constitution or laws of the United States, or employed proper criteria but applied them in such a way, given the Massachusetts court's binding construction of the rights and liabilities under the Massachusetts statute, as to create such a conflict. This, we believe, to be the teaching of the cases on this subject. *Clement National Bank v. Vermont*, 231 U.S. 120, 134. *Colorado National Bank of Denver v. Bedford*, 310 U.S. 41, 52. *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99. *Kern-Limerick, Inc., v. Scurlock*, 347 U.S. 110, 119.

In the present case, we submit, the federal aspects were fully satisfied. The Massachusetts court used as its controlling test the rule enunciated in *Kern-Limerick*, at pp. 121-122—the determination of "who is responsible . . . for payment to the state of the exaction" (A. 36). In applying that test the Massachusetts court used an analysis which, we submit, fully comported with the federal standards enunciated in the cases cited. Having enumerated just above the factors that the Massachusetts court considered,

we will not restate them here. We submit that they were correctly applied in their federal aspect.

The appellee therefore concludes this portion of its argument by asserting that the Massachusetts court's holding that the legal incidence of the sales tax is on the vendor is correct and should be affirmed.

III. TITLE 12 U.S.C. § 548, NEITHER EXPRESSLY NOR IMPLICEDLY PROHIBITS A STATE FROM APPLYING A NONDISCRIMINATORY USE TAX TO PURCHASES BY NATIONAL BANKS, AND IT MAY NOT BE INVOKED BY A NATIONAL BANK TO CLAIM AN IMMUNITY FROM A NONDISCRIMINATORY SALES TAX WHEN THE LEGAL INCIDENCE OF THE LATTER TAX DOES NOT FALL ON THE BANK.

The appellant argues that 12 U.S.C. § 548 (Rev. Sts. § 5219, as amended), is the exclusive source of the jurisdiction of the states to tax national banks, and that any state tax which is not enumerated therein is void. It is our position as the appellee that section 548 only defines the conditions under which the states may levy the kinds of taxes specifically mentioned in section 548, and does not outlaw the sales and use taxes involved in the present case. And, in any event, section 548 has no application to the Massachusetts sales tax, since, for the reasons already stated in this brief, the legal incidence of that tax, unlike the legal incidence of the use tax, does not fall on the bank as a purchaser.

Section 548 is set forth at pages 54-55 of the Appendix to the appellant's brief. This section, we observe, is not cast in the form of a prohibition or an exemption,¹ but

¹ Contrast 12 U.S.C. § 531: "Federal reserve banks . . . shall be exempt from Federal, State, and local taxation, except taxes on real estate." See also the numerous other contrasting statutory tax exemptions cited by the Massachusetts Supreme Judicial Court (A. 57, n. 23).

rather in the form of an enumeration of the conditions on which the states may tax the shares of national banks. It provides in pertinent part:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with . . ."

Observing that the foregoing section does not purport to grant an exemption, the Massachusetts court said:

"Any construction of § 548 which would prohibit the imposition of a use tax upon a national bank must rest on implication since the section, by its terms, does not purport to prohibit any taxation." (A. 57.)

Yet such an implication is impermissible, since, as the Massachusetts court ruled, citing the following cases, the law is clear that tax exemptions are not granted by implication. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480. *United States Trust Co. v. Helvering*, 307 U.S. 57, 60. *Oklahoma Tax Commission v. United States*, 319 U.S. 598, 604. *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 366. This rule has an especially fitting application to a lost intergovernmental immunity. As the Massachusetts court said, quoting *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 366, "[t]he immunity formerly

said to rest on constitutional implication cannot now be resurrected in the form of statutory implication."

Actually, the appellant in the present case seeks more than resurrection of an original immunity. The immunity that the appellant would have this Court resurrect is an immunity that was given, not by section 548 when first enacted, but rather by later judicial departures. It is now time to return to the original meaning.

Section 548 began with a proviso in section 41 of the National Currency Act of 1864 (13 Stat. 99). That section stated first that, "in lieu of all existing taxes," national banks were to pay to the federal government taxes on their circulating notes, deposits and capital (beyond the amount invested in United States bonds). This was followed by three provisos, which read:

"Provided, That nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: *Provided, further,* That the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located: *Provided, also,* That nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

The striking feature of these provisos is that they were framed, not in terms of a grant of jurisdiction to the states, but rather in terms of the regulation of a jurisdiction that the states already possessed. Good tax and constitutional reasons justified the use of this form of statement.

The tax reasons stemmed from the structure of the state tax systems in 1864. A careful student of the relation of these sections to section 548 (Rev. Sts. § 5219, as amended) has written: "At the time of the enactment of Section 5219, the general property tax was the almost universal source of state and local revenue, and it was for this system that the section was intended." Ronald B. Welch, "State and Local Taxation of Banks in the United States," Special Report No. 7 of the State Tax Commission of the State of New York (1934), p. 21.

The constitutional reasons had their roots in *M'Culloch v. Maryland*. Still fresh in 1864 was Chief Justice Marshall's important qualification in that case:

"This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State." 4 Wheat. at 436.

The continuing vitality of the foregoing qualification was manifested in *Van Allen v. Assessors*, 3 Wall. 573, decided in 1865. In rejecting an argument that the provisos were unlawful delegations of federal power to the states, this Court declared:

"It is said that Congress possesses no power to confer upon a State authority to be exercised which

has been exclusively delegated to that body by the Constitution, and, consequently, that it cannot confer upon a State the sovereign right of taxation; nor is a State competent to receive a grant of any such power from Congress. We agree to this. But as it respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority *and leave the States free to act.*" 3 Wall. at 585. (Emphasis added.)

Such, then, is the tax and constitutional background against which the enactment of the provisos in 1864 should be judged. The debates leading to their adoption are also relevant, and we, like the appellant, have examined them. We agree with the appellant that the debates ended in a compromise (appellant's brief, p. 17). But we differ with the appellant on the nature of the settlement. It was not a compromise by which Congress granted jurisdiction to the states; rather it was a compromise by which Congress preempted for the federal government jurisdiction to tax the circulating notes, deposits and capital of the national banks and left to the states, subject to certain safeguards against discriminatory action, their preexisting jurisdiction to tax shares and real estate.

This declaratory nature of section 5219 (the section of the Revised Statutes into which the provisos were later incorporated) in respect of the states' jurisdiction was reaffirmed in 1877. In *Adams v. Nashville*, 95 U.S. 19, this Court stated:

"The act of Congress [section 5219] was not intended to curtail the State power on the subject of

taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested." (At p. 22.)

In 1899, however, there was a sudden and, we submit, an erroneous departure from the earlier determinations. Reversing the original construction of the statute, *Owensboro National Bank v. Owensboro*, 173 U.S. 664, ruled that the provisos, instead of being declaratory of the jurisdiction of the states, were the source of the states' power to tax national banks. Subsequent cases, as the appellant indicates (appellant's brief, pp. 10-11), have repeated the *Owensboro* proposition.

Still, the original purpose of the provisos has not been forgotten. In *Clement National Bank v. Vermont*, 231 U.S. 120, the Court said:

"The object [of section 5219] is to prevent hostile discrimination and for this purpose a standard is fixed." (At p. 135.)

And in *Des Moines National Bank v. Fairweather*, 263 U.S. 103, 116, the Court said, with respect to the section:

"Its main purpose is to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a business similar to that of national banks or engaging in operations and investments of a like character; . . ."

Nor, in fact, has the *Owensboro* proposition itself gone unchallenged. In *Bank of California v. Richardson*, 248 U.S. 476, which held that a state could not tax a national bank on stock held in a state bank, since this was a subject

of taxation not mentioned in the provisos, there was a dissent by Mr. Justice Pitney, who said:

"Upon the last point I understand the case to be controlled by the decision of this court in *Owensboro National Bank v. Owensboro*, 173 U.S. 664, where it was held that § 5219 had the effect of exempting not only the operations and franchises but the property of the national banks from state taxation, except as to their real estate. There are weighty considerations to the contrary, which seem not to have been called to the attention of the court in that case—certainly are not adverted to in the opinion—but it would serve no useful purpose to bring them into the present discussion." (pp. 488-489.)

We believe that a useful purpose would now be served by returning to the original understanding of that section.

Subsequent congressional amendments of the section are consistent with our position. The 1923 amendment (Act of March 4, 1923, c. 267, 42 Stat. 1499) and the 1926 amendment (Act of March 25, 1926, c. 88, 44 Stat. 223) were passed as responses to the possibility, after the decision in *Merchants' National Bank of Richmond, Virginia v. Richmond*, 256 U.S. 635, that taxes on national bank shares might be held to be violative of section 5219 in states where taxes on income from certain other moneyed capital was levied at a lower rate than property taxes on the shares. See Ronald B. Welch, "State and Local Taxation of Banks in the United States," p. 41, *supra*, at pp. 36-43. The 1923 and 1926 amendments accordingly liberalized the conditions of state taxation of national-bank shares, taking into account new forms of taxation.

As in the original provisos in 1864, Congress, in passing the amendments, did not speak in terms of the national

banks enjoying an exemption, but only in terms of each state determining "the manner and place of taxing all the shares of national banking associations located within its limits." 12 U.S.C. § 548.

The appellant has invoked this statute in the present case to obtain an exemption from nondiscriminatory sales and use taxes. We deny that the statute grants such an exemption, and justice does not warrant one. Indeed, it would be ironical if the regulation of taxation of national bank shares, framed to prevent discriminatory treatment of national banks, should now become the means by which these banks would receive an exemption and an advantage denied to their competitors, the state-chartered banks. Yet this is the result that the appellant seeks. It is a result that would amount to an expansion, by judicial decree, of federal restrictions on state taxation of national banks.

The existing congressional scheme of regulation is framed in terms of an enumeration of the standards and conditions on the imposition of certain state taxes. These taxes—property taxes, income taxes, and taxes measured by income—have a direct bearing on the value of an investment in a national bank as compared to an investment in other moneyed capital. Sales and use taxes, on the other hand, such as those in the present case, which by their terms fall impartially on both national and state banks and all other financial institutions, are inherently equal. Thus no supplemental restriction by Congress or by this Court is required to ensure equality of their practical application. *Tradesmens National Bank of Oklahoma v. Oklahoma Tax Commission*, 309 U.S. 560, 567. *Michigan National Bank v. Michigan*, 365 U.S., 467, 472-473.

We therefore conclude this section of our brief by requesting the Court not to read into section 548 the implied preferential exemption that the appellant seeks.

Conclusion.

The appellee submits that the judgment of the Massachusetts Supreme Judicial Court was correct in all respects and should be affirmed.

Respectfully submitted,

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March, 1968



Supreme Court of the United States

No. 755 October Term, 1967

FIRST AGRICULTURAL NATIONAL BANK
OF BERKSHIRE COUNTY,

Appellant

STATE TAX COMMISSION,

Appellee

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA AS AMICUS CURIAE

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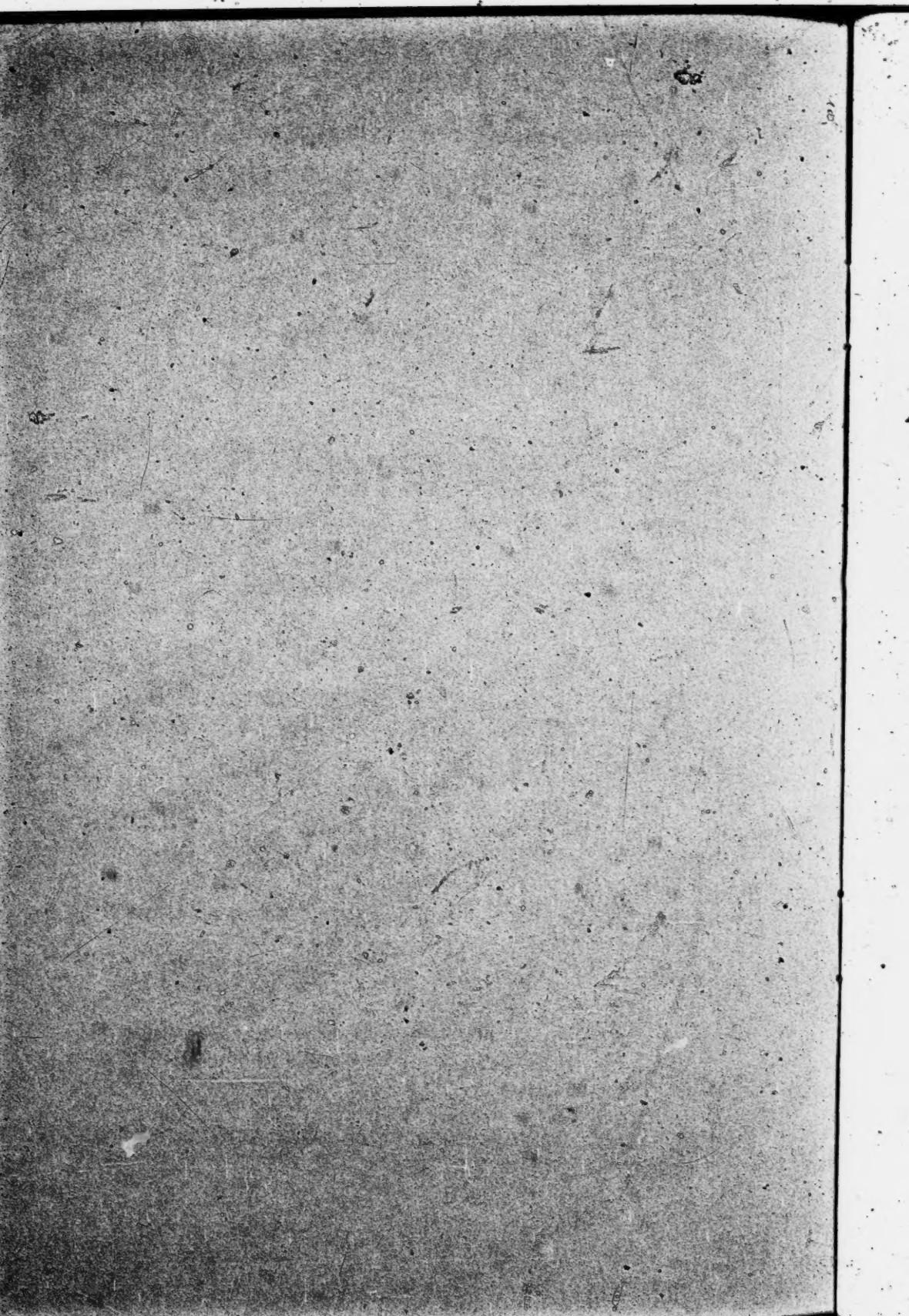


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IN THE SUPREME COURT OF THE
UNITED STATES

No. 755 October Term, 1967

First Agricultural National Bank of Berkshire
County,

Appellant

v.

State Tax Commission,

Appellee

BRIEF FOR THE COMMONWEALTH OF
PENNSYLVANIA AS AMICUS CURIAE

This brief as amicus curiae is submitted by the Commonwealth of Pennsylvania, sponsored by the Attorney General, William C. Sennett, in accordance with the authority provided in Rule 42 of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The Opinion of the Supreme Court of Massachusetts is reported at 229 N.E. 2d 245 (Mass. 1967). For a copy of the said Opinion and Concurring Opinion (Appendix, pp. 31-58).

JURISDICTION

The judgment of the Supreme Court of Massachusetts was entered on August 9, 1967 (Appendix, pp. 60-61), following the decision of that court sustaining the validity of the tax in question. The jurisdictional requisites are adequately set forth in the appeal filed by Appellant.

QUESTION PRESENTED

Are national banks Federal instrumentalities for the purposes of State Sales and Use Taxes in light of the development, both factual and judicial, of the relationship between national banks and the Federal Government?

STATEMENT OF INTEREST

The Pennsylvania Tax Act of 1963 for Education, (Act of March 6, 1956 (1955), P. L. 1228, as amended, 72 P.S. 3403 et seq.), imposes an excise tax on the sale or use of tangible personal property within the Commonwealth of Pennsylvania. Section 203(i) of the Act excludes from the tax:

- “the sale at retail to, or use by the United States, this Commonwealth or its instrumentalities or political subdivisions of tangible personal property or services.”

The Act further provides in Section 580(a), *inter alia*, that the Department of Revenue of the Commonwealth of Pennsylvania is authorized and empowered to prescribe, adopt, promulgate and enforce rules and regulations not inconsistent of the provisions of the Act. Pursuant to this statutory authority, the Department of Revenue, Commonwealth of Pennsylvania, with the approval of the Department of Justice of the Commonwealth of Pennsylvania, issued Regulation 206 which provides as follows:

“[¶ 22,093] Reg. 206. Sales to the United States Government or within areas subject to the jurisdiction of the federal government.—(Formerly Regulation TRa 205.) 1. Sales to the United States.—Sales of tangible personal property or services to the Government of the United States are not subject to tax under the Act. Tax need not be collected on such

sales to a regular department (such as Defense, Interior, Agriculture, Post Office, Commerce) of the United States. See Regulation 200, Exemption Certificates.

"5 Federal Reserve Banks and their branch banks are exempt from the payment of sales and use taxes under the Act. (See also Section 7 of the Federal Reserve Act.) However, commercial banks which are merely member banks of the Federal Reserve System are subject to sales and use tax. The only banks in Pennsylvania entitled to this exemption are the Federal Reserve Bank of Philadelphia, District No. 3, and the Pittsburgh Branch of the Federal Reserve Bank of Cleveland, District No. 4.

"10 2. Non-exempt agencies.—National Banks, Federal Savings and Loan Associations, Federal Credit Unions, Joint Stock Land Banks, National Park Concessioners, The Atomic Energy Commission, Federal licensees such as Warehouses and Stockyards, and construction contractors engaged in the improvement of real estate (buildings, roads, structures, bridges) owned by an exempt Federal Agency, and similar corporations, companies, institutions or persons are not exempt.

"15 3. Sales within federal areas.—Sales of tangible personal property by persons doing business in a federal area within the borders of this Commonwealth are taxable unless specifically exempt by some other regulation. Such vendor must collect the tax at the time of sale. * * *

Statement of Interest

This, or a similar Regulation, has been in effect from the inception of the Pennsylvania Sales and Use Tax Act on March 6, 1956.

At the present time, there are three appeals pending in the Commonwealth Court of Dauphin County of the Commonwealth of Pennsylvania contesting the legality of Regulation 206 as it pertains to sales of tangible personal property to national banks. These cases are:

Commonwealth v. Northeastern National Bank and Trust Company, No. 126 Commonwealth Docket, 1967;

Commonwealth v. First National Bank of Peckville, No. 539 Commonwealth Docket, 1967; and

Commonwealth v. Hazleton National Bank, No. 529 Commonwealth Docket, 1967.

These cases all arise under a Petition for Refund of taxes voluntarily paid pursuant to the Act and the Regulation. Further, there are numerous cases pending at the various administrative levels as provided in the Act similarly raising the legality of Regulation 206. Thus, it has been the position of the Commonwealth of Pennsylvania since 1956 that national banks are not instrumentalities of the Federal Government and are subject to the provisions of the Pennsylvania Sales and Use Tax Act as any other vendor or vendee. Although such a pronouncement has not resulted in a major source of tax revenue, it has been a source of revenue relied on by the Commonwealth of Pennsylvania in providing services to its citizens and others. It is further to be noted that Section 553(d) of the Act provides that where an interpretation of the Act has been held to be erroneous by a court of competent juris-

diction, a five-year statute of limitations for refunds arises. Therefore, if it is concluded that national banks are federal instrumentalities, the Commonwealth of Pennsylvania will not only lose a source of tax revenues, but also be obligated to pay considerable refunds of taxes voluntarily paid for a five-year period.

The Commonwealth of Pennsylvania, as does many other jurisdictions, regulates state chartered banks. It is submitted that if it is determined that national banks are not subject to the Pennsylvania Sales and Use Tax, a distinctive unfair advantage will be granted to national banks as opposed to state banks. There is little doubt that these two types of financial institutions are in direct competition, and such an advantage would not only be unfair, but would in all probability necessitate the Commonwealth of Pennsylvania to rule that state banks would not be subject to the Pennsylvania Sales and Use Tax. Thus, an adverse holding to Pennsylvania's position would result in the further loss of state tax revenues.

The Commonwealth of Pennsylvania's interest in the instant matter is both pecuniary and regulatory, as well as an interest in a legal determination which has received varying conclusions from courts in the past. A definitive resolution of the problem by this Honorable Court will enable the Commonwealth of Pennsylvania, as well as other interested states, to chart a more precise course in future areas of state tax revenues and state bank regulation.

ARGUMENT**A. National Banks Are Not Federal Instrumentalities for State Sales and Use Tax Purposes**

The opinion of the Massachusetts Supreme Court adequately describes the legislative and judicial history of national banks since their inception. The court's conclusion that although at one time national banks were instrumentalities of the Federal Government, that presently because of legislative and judicial review, such banks are no longer instrumentalities of the Federal Government, is a most proper and logical conclusion. The opinion of the Massachusetts court deals both with the sales tax aspect of the case and the use tax aspect of the case. Because of the nature of the Pennsylvania Act, the Commonwealth of Pennsylvania is primarily concerned with the issue raised under the use tax discussion. The Pennsylvania statute imposes tax both on the vendor and vendee and makes each equally and severally liable for the tax (Sections 201(a) and 201(b)). If a national bank is determined to be exempt from State taxation as a Federal instrumentality, those banks in Pennsylvania would be excluded from both the sales and use tax contained in the Pennsylvania statute. Therefore, for the purposes of the Commonwealth of Pennsylvania, it must be determined that national banks are no longer Federal instrumentalities in relation to state sales or use tax purposes (See Concurring Opinion, Appendix, p. 58).

The recent opinion by the Court of Appeals of New York State in *Liberty National Bank and Trust Company v. Buscaglia*, N.Y. 2d , opinion dated December 29, 1967, interpreted a statute similar to the Pennsylvania Act. It was the conclusion of a unanimous court that national banks were not granted immunity from state taxation as being instrumentalities of the Federal Government and, therefore, were subject to the New York sales and use tax. Again, the judicial and legislative history of national banks is detailed in the New York opinion. The New York court notes:

“Since that date [1935] national banks perform no governmental functions whatever. They, like state banks, are privately owned and operated. Also like state banks, they are depositories for federal funds—indeed legislation forbids discrimination for that purpose between state and national banks which are members of the Federal Reserve System (12 U.S.C. §265). In addition, like any private enterprise engaging in activities affected with a public interest, they are subject to severe government regulation. This regulation is accomplished via membership in the Federal Reserve System—membership which is open to state banks upon a voluntary basis. (12 U.S.C. §321 [1964])”

Later in its opinion, as a factual matter, the New York court states:

“The Bank concededly performs no governmental function whatever nor does it perform any direct service for the government different from any state bank which may be voluntarily associated with the Federal Reserve System. The bank is privately owned and operated primarily for the private benefit of its

owners. While it is subject to strict regulation for the public benefit, as any private enterprise whose operations are affected with a public interest, this regulation would hardly be sufficient to render the bank an instrumentality of the federal government so as to entitle it to the same immunity from taxation as the federal government itself."

In a concluding paragraph, the New York court precisely points to the issue and rationale of the instant dispute.

"We note in conclusion that the problems which face state and local governments in meeting their responsibilities in our complex society require the expenditure of vast amounts of money. The Liberty National Bank and Trust Company has not presented us with a single rational argument, aside from a string of cases which were relevant in another time and under different circumstances, why it should not, like any other business enterprise, contribute to the costs. And we perceive none."

The Commonwealth of Pennsylvania urges this Honorable Court to consider this statement in light of the present-day posture of state taxation.

Therefore, it has been the determination of two of the most distinguished state appellate courts that national banks no longer enjoy immunity from state taxation, unless permitted by the Congress. Each opinion was unanimous and extremely well reasoned and documented. It is submitted that this Honorable Court should examine both of these decisions with care, and although certainly not binding upon, this Honorable Court should indicate the thinking and rationale of the state courts in which the problem has arisen.

B. Section 548 of the United States Code Does Not Prohibit the Imposition of Sales or Use Taxes on National Banks by State Governments

Assuming a national bank is not a Federal instrumentality for the purposes of this case, it has been contended that in any event Section 548 of Title 12 of the United States Code prohibits the imposition of the tax in question. The Commonwealth of Pennsylvania submits that the courts of New York and Massachusetts have adequately covered this point and have demonstrated that the provisions of Section 548 have no bearing on the instant controversy.

It is to be noted that Section 548 was last amended in 1926 and has remained in its present form since that year. In 1926 few state governments imposed a Sales and Use Tax Act, and such a tax had little effect on a particular state's budget. Today practically every state imposes a Sales and Use Tax, and such a source of revenue constitutes the major portion of many states' budgets. It is pointed out in *CCH, All-State Sales Tax Reporter*, Volume 1, page 511, as follows:

"The movement for a national sales tax was again revived after World War II, but in the meantime a significant change had occurred in the nation's taxing pattern. In 1921, West Virginia passed a general sales tax; during the depression, nineteen states enacted similar statutes in two years. Today, sales taxes are collected in 42 states, plus the District of Columbia, and are, on a national basis, the most important single source of state revenues. In fiscal 1965, sales

Argument

taxes were the top state tax revenue source and the best source of revenue in 30 states."

This, therefore, is another factual change that supports the proposition that national banks may be taxed under a state Sales and Use Tax Act. Section 548 of the United States Code was never meant to prohibit a state from uniformly imposing a sales or use tax on national banks, in a uniform, nondiscriminatory manner. Such a tax is not a tax on the shares of a national bank, on its income, dividends or real estate. It is simply an excise tax on the sale or use of tangible personal property, not in any way prohibited or limited by Section 548.

CONCLUSION

It is respectfully submitted that national banks can no longer be considered a Federal instrumentality for the purposes of sales and use taxes imposed by the states. The imposition of such a nondiscriminatory tax upon both State and Federal banks is not prohibited by the Constitution or Section 548 of the United States Code. An area of state tax revenue should not be eliminated when any purpose or reason for such elimination has long since disappeared. The opinion and order of the Supreme Court of Massachusetts should be affirmed.

Respectfully submitted,

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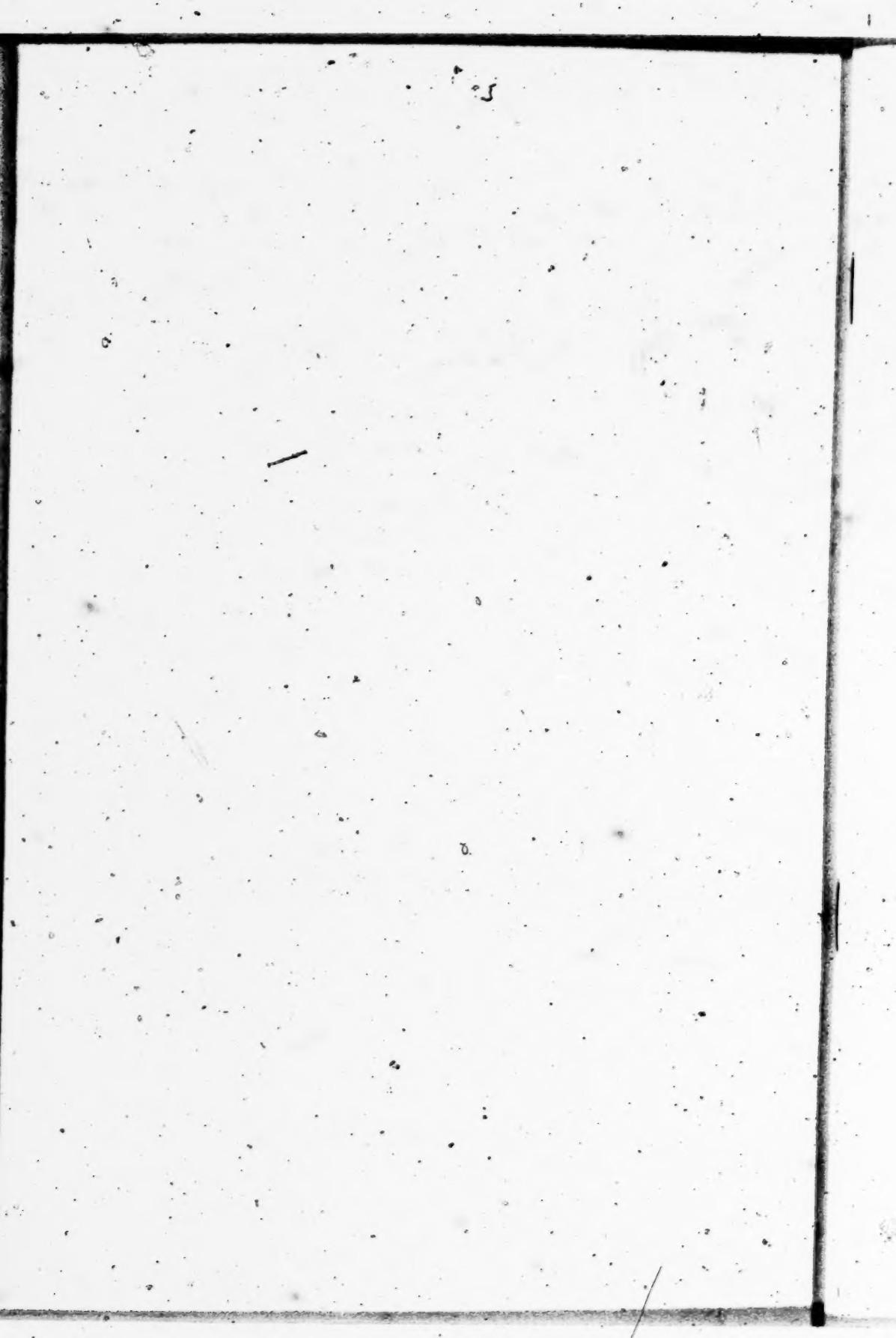
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

FIRST AGRICULTURAL NATIONAL BANK
OF BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Judicial Court
for the Commonwealth of Massachusetts

**BRIEF OF THE NATIONAL ASSOCIATION OF
SUPERVISORS OF STATE BANKS
AS AMICUS CURIAE**

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March 29, 1968



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IN THE
Supreme Court of the United States
OCTOBER TERM, 1967

No. 755

FIRST AGRICULTURAL NATIONAL BANK
OF BERKSHIRE COUNTY,

Appellant,

v.

STATE TAX COMMISSION,

Appellee.

On Appeal from the Supreme Judicial Court
for the Commonwealth of Massachusetts

BRIEF OF THE NATIONAL ASSOCIATION OF
SUPERVISORS OF STATE BANKS
AS AMICUS CURIAE

INTRODUCTION

The National Association of Supervisors of State Banks respectfully submits this brief as amicus curiae in support of Appellee in this case.

The Association requested Appellant's consent to the filing of this brief. Such consent was refused and, accordingly, a motion for leave to file such brief pursuant to Rule 42 of this Court's Rules has contemporaneously been filed herewith.

The Association. The National Association of Supervisors of State Banks (hereinafter the "Supervisors" or the "Association") was founded in 1902 and has 52 members. It is composed of the officials of state governments responsible for the supervision of state-chartered banking institutions in every state of the United States, Puerto Rico and the Virgin Islands. As of June 30, 1967, there were 9,487 commercial and mutual savings banks chartered under state laws subject to the Supervisors' jurisdiction with total resources of approximately 237 billion dollars. See Appendix A.

The Board of Directors of the Association, consisting of Supervisor members, is the governing body of the Association under its Articles, having authority to supervise its affairs and determine its policies.

State banks were invited to join the Association as "associate" members beginning in 1958. There are currently 4,434 such dues paying associate members. Representatives from the associate membership advise and assist the Board of Directors.

Position of the Supervisors. The ultimate question before the Court in this case is whether the State of Massachusetts may impose a nondiscriminatory general sales and use tax on a national bank located within that state. This tax is applicable to, and paid by, state banks located within the state.

This ultimate issue, in turn, brings before this Court two subsidiary questions upon which the Supervisors take the following position:

First, under the current factual situation surrounding the status and function of national banks within the banking structure of the United States, can national banks still be considered fiscal or monetary agents of the United States so as to continue to be eligible to hold the status of a tax-immune instrumentality? There is no dispute with regard to applicable constitutional law: agencies and

instrumentalities of the United States are immune from state and local taxation, absent Congressional assent, and there has been no specific statutory assent to the application of Massachusetts' sales and use taxes to national banks. The question, however, is whether national banks can *currently* be considered fiscal or monetary agents of the United States Government entitled to claim such tax immunity. The Supervisors' position is that while national banks *were* once federal instrumentalities entitled to constitutional immunity, such is clearly not the case *today*.

Assuming that the Court answers the first question in the negative, a second question arises. Has Congress specifically prohibited the states from including national banks within the scope of a nondiscriminatory sales and use tax? There is no specific exclusion in the National Bank Act prohibiting state sales and use taxes, nor has this Court ever held that such a prohibition of such taxes is implied from that Act. Appellant asserts, however, that the provision in the National Bank Act initially passed by Congress in 1864,¹ and now set forth in 12 U.S.C. § 548, constitutes an automatic Congressional proscription of all state taxes on national banks not specifically enumerated or discussed therein. The Supervisors' position is that this assertion is not justified by a reading of the statute or of its legislative history, or by the application of recognized canons of statutory construction. Further, decisions of this Court, cited by Appellant in support of its contention, are decisions influenced by the "federal instrumentality" status heretofore accorded national banks, based upon now-changed facts and are no longer tenable. Finally, Appellant's plea for tax immunity runs counter to decisions of this Court for the past three decades which have, with increasing frequency, de-

¹ Act of June 3, 1864, c. 106, § 41, 13 Stat. 111.

nied assertions of an implied immunity from nondiscriminatory state taxation.²

Interest of the Supervisors. The Supervisors have a keen interest in the resolution of the foregoing questions.

As officials of the governments of the various states, they, of course, share the concern of the Appellee over the necessity of seeking additional revenue, on the basis of a fair tax structure, in order to meet ever-increasing demands.³ Such a concern has also underlined this Court's decisions reflecting a general curtailment of tax immunity in recent years (p. 28, *infra*).

The Supervisors' crucial interest in this case, however, is broader than that of Appellee. It relates to their responsibility for a sound state-chartered banking system able to meet the needs of the communities which it serves, and able to grow within the framework of the dual banking system.

The present system of federally chartered, or national banks, was created in 1863 (p. 15, *infra*). The Comptroller of the Currency is authorized to charter and supervise national banks under the provisions of the National Bank Act.⁴ As of June 30, 1967, there were 4,780 national banks with assets in excess of 242 billion dollars. See Appendix A. State banks, under state charters, and national banks, under federal charter, together comprise the "dual banking system" of the United States.

² The Supervisors take no position on the remaining question before this Court: whether the incidence of the taxes fall on the seller or the buyer.

³ State sales and use taxes only became prevalent during the second and third decade of this century. As state expenditures increased from \$10.8 billion in 1950 to \$31.3 billion in 1965 the revenue resulting from sales taxes rose from \$1.6 billion in 1950 to \$6.7 billion in 1965 and \$7.8 billion in 1966. Tax Foundation, Inc., *Facts and Figures on Government Finance*, pp. 157, 187 (1967). The importance of such revenue is obvious.

* Act of June 3, 1864, c. 106, 13 Stat. 99, 12 U.S.C. § 21 *et seq.*

It is elementary economics that although state statutes, governing state banks, and the National Bank Act, governing national banks, can (and do) vary in many significant areas, the survival of one or the other class of banks in any state must rest upon an equality in certain basic competitive areas. If one or the other class of banks in a particular state is substantially underprivileged, such underprivileged banks will convert to the other system, eventually leaving the dual banking system an empty shell.

Such a competitive inequality exists in a number of states with regard to sales and use taxes. As indicated by Appendix B, there are forty-four states which presently impose such taxes. In twenty of these states, national banks are expressly exempt from such taxes by way of a statutory provision, regulation, or administrative or court ruling, and whenever the basis for that exemption is stated, it is because of a belief that national banks hold a constitutionally-immune status with regard to such taxes. Accordingly, as the court below found, whereas "plaintiff national bank enjoys the benefits of State and local services, the protection of the laws of the State, access to its courts, and the patronage of its citizens", it nevertheless escapes "a tax borne by its State chartered competitors" placing them at a "competitive disadvantage" (Jur.St., p. 48).⁶

Further, a decision by this Court dealing in depth with the issues set forth above may have an impact beyond the single issue of the applicability of general sales and use taxes to national banks. Appellant in its Jurisdi-

⁶ Some states have avoided the problem of competitive inequality by exempting state banks from the sales tax because national banks are considered to be exempt. See Appendix B. On the other hand, as indicated by the case below, *Liberty Nat'l Bank & Trust Co. v. Buscaglia*, ____ N.Y. 2d ____ (1967), and several of the recent rulings set out in Appendix B, other states are challenging the tax immunity claimed by national banks from state sales and use taxes.

tional Statement filed with this Court made the following succinct statement with which the Supervisors fully agree:

"The relationship of national banks to the Federal Government is an important factor affecting the status of national banks under a vast spectrum of state law. A decision by this Court with respect to the status of national banks as instrumentalities of the Federal Government, therefore, would have a far-reaching effect on the extent to which states can tax, regulate and otherwise impose their authority on such banks. For this reason, such a decision would affect approximately 4,800 national banks conducting banking operations in all of the several states."

Juris. St., p. 24.

Equally so, the decision of this Court will affect the 9,487 state banks conducting banking operations in all of the several states. Their ability to compete with national banks depends, in large part, upon whether both classes of banks play by the same basic "ground rules" in important competitive areas. The question of the applicability of state law to national banks, therefore, assumes a status of critical importance to the maintenance of competitive equality between national and state banks within the framework of the dual banking system. It is for this reason that the Supervisors seek to appear as amicus curiae in this case.

SUMMARY OF ARGUMENT

With regard to areas other than state taxation, the applicability of state law to national banks has been resolved by this Court in a long line of decisions, the most recent of which was made last term in *First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). Congress, in the exercise of its power over national banks, has given a special significance to the applicability of state law to national banks. In some of the most important areas of competition between national and state

banks, Congress has in the National Bank Act specifically adopted state law as the standard for national banks. Further, in addition to specifically applying state law to national banks in many instances, Congress did not seek to occupy the field so as to preclude the application of state laws to national banks which do not conflict with federal law. This special significance granted to the applicability of state law to national banks has been described by this Court as a "policy of equalization" adopted in the National Bank Act of 1864. *First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966); *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559, 565-566 (1934).

In the area of state law relating to taxation, however, the applicability of the "policy of equalization" is less clear. In *Lewis v. Fidelity & Deposit Co.*, *supra*, Mr. Justice Brandeis indicated that the "policy of equalization" was applicable to state taxation of national banks. Writing for the Court he said: "The policy of equalization was adopted in the National Bank Act of 1864, and has ever since been applied in the provision concerning taxation." (Footnote omitted) (Emphasis added). In support of this assertion, he cited Section 5219, 12 U.S.C. § 548, which is the taxation provision in the National Bank Act (upon which Appellant relies in its argument here that it is immune from a state sales and use tax applicable to its state bank competitors) as well as a number of decisions of this Court. These cases made it clear that the "main purpose . . . of Congress in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business and operations and investments of a like character" and that the "language of the Act of Congress is to be read in the light of this policy." *Mercantile National Bank v. New York*, 121

U.S. 138, 155 (1887). See also, *Michigan National Bank v. Michigan*, 365 U.S. 467, 476-477 (1961).

The question remains, however, as to whether the intent of Congress was solely to establish a "policy of equalization" with regard to the application to national banks of those taxes *specifically* specified in Section 5219, which admittedly do not include state sales and use taxes, or whether Congress intended what might be termed a "policy of inequality" with regard to all *other* taxes not specifically mentioned, and intended to prohibit the application of such other taxes to national banks even though they are paid by competing state banks and are nondiscriminatory in nature.

Appellant relies upon cases decided by this Court the effect of which is to so hold. They find that national banks are "federal instrumentalities" and, therefore, are within the scope of the principle of constitutional law prohibiting taxation by state and local government of federal instrumentalities absent Congressional assent. The Supervisors urge a reconsideration of these cases for, as Mr. Justice Brandeis has written, in "cases involving constitutional issues . . . this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with *experience and facts newly ascertained*, so that its judicial authority may . . . 'depend altogether on the force of the reasoning by which it is supported'." Appellant would claim that these cases are so "embedded" in the law, that they may not be disturbed. But certainly this Court, on different facts, has not hesitated to reverse prior application of constitutional doctrine equally long "embedded" in the law.

Both the court below and the Court of Appeals of New York in *Liberty National Bank & Trust Co. v. Buscaglia*, — N.Y. 2d — (1967) have set forth a scholarly

* *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412-3 (1932) (dissenting opinion) (Emphasis added). To the same effect, see decisions of this Court at p.*12.

development of the status and function of national banks since their creation in 1863, and of their predecessors, the first (1791-1811) and second (1816-1832) Banks of the United States established during the early years of the Republic. Whereas once these banks may have played an important role in the fiscal operations of the Government, particularly with regard to the issuance of currency, this role diminished to the point of extinction with the adoption of the elaborate system of monetary controls in the Federal Reserve Act of 1913,⁷ and the retirement of notes issued by the national banks in 1935.⁸ There is, in fact, little distinction today between national and state banks operating side by side throughout the United States insofar as they may be considered fiscal or monetary agencies of the United States. Certainly, for this purpose there is no difference *whatever* between national banks and state banks which are members of the Federal Reserve System.⁹

The opinion of the court below, and of the New York Court of Appeal in *Liberty National Bank*, have also demonstrated that decisions of this Court finding national banks "federal instrumentalities" for the purpose of an implied state tax immunity were based upon a factual base utterly different from that existing today and that more recent decisions of this Court repeating that doctrine had not re-examined the factual base upon which the earlier decisions were made in the light of the current banking structure of the United States.

⁷ Act of Dec. 23, 1913, c. 6, 38 Stat. 251, 12 U.S.C. § 221 *et seq.*

⁸ See 12 U.S.C. § 41.

⁹ Of the 8,982 commercial state banks, 1,327 belong to the Federal Reserve System. These are the largest and most powerful state banks, as evidenced by the fact that their assets comprise 58% of all assets of all state commercial banks. See Appendix A. The remaining commercial state banks are almost all non-member banks insured by the Federal Deposit Insurance Corporation. A very few fall into neither category. *Id.*

Appellant's second line of argument purports to be separate and apart from the "federal instrumentality" decisions of this Court. It contends that Congress, in the exercise of its authority over national banks which it authorized, specifically intended a partial policy of inequality with regard to state taxation. Appellant bases this argument on the proposition that in 12 U.S.C. § 548 Congress authorized state taxation of national banks in only one of four specified methods (in addition to taxation of real estate), and that the failure of Congress to specify other taxes, such as sales and use taxes, constitutes a specific demonstration of Congressional intent to prohibit such other forms of state taxation.

In support of the foregoing proposition, Appellant cites the legislative history of the 1864 provision now set forth in 12 U.S.C. § 548. However, a fair reading of the legislative history does not support that conclusion. It is apparent that Congress was concerned with dealing with the method by which states might employ the specific taxation which Mr. Justice Marshall had indicated in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), the states already possessed, and was seeking to assure a nondiscriminatory application of such taxes. An effort to assure a nondiscriminatory implementation of certain taxing authority does not, as Appellant contends, constitute a finding of Congressional intent to bar all *other* forms of nondiscriminatory state taxation. Far more appropriate in the premises is the often-employed canon of statutory construction applied by this Court to the effect that tax immunity is lightly to be implied. Further the decisions relied upon by the Appellant in support of its argument can be traced to *M'Culloch*, or to *Owensboro* which, in turn, relied upon *M'Culloch*,¹⁰ demonstrating the continu-

¹⁰ The cases primarily relied upon by appellant in this regard are cited at page 11 of Appellant's brief. *Owensboro Nat'l Bank v. Owensboro*, 173 U.S. 664, 667 (1889) relies upon *M'Culloch*. *Bank of California v. Richardson*, 248 U.S. 476, 482, 483 (1919) in turn

ing influence in such decisions of the now outdated doctrine of national banks as "federal instrumentalities". As such, they should not be permitted to bar the applicability of nondiscriminatory state sales and use taxes to national banks when such taxes are applicable to their competitor state banks.

Finally, it should be emphasized, Appellant does not claim, nor could it claim, that the application of state sales and use taxes to national banks would discriminate against national banks, or would adversely affect, or interfere with, their operations or will constitute a burden on any operation of the United States Government. The sole basis for Appellant's insistence on a tax advantage over its state bank competitors is an historical and legal anachronism related to another era which should be rejected by this Court.¹¹

ARGUMENT

I. A National Bank Is Not an Instrumentality of the Federal Government Immune From Nondiscriminatory State Taxation

That instrumentalities of the federal government are immune from state taxation except as Congress may oth-

relies upon *Owensboro* and *M'Culloch*. *Des Moines Nat'l Bank v. Fairweather*, 263 U.S. 103, 107 (1923) relies on *Owensboro*. *First Nat'l Bank of Guthrie Center v. Anderson*, 269 U.S. 341, 347 (1926) relies upon *Des Moines*. *First Nat'l Bank of Hartford v. Hartford*, 273 U.S. 548, 550 (1927) relies upon *Anderson* and *Des Moines*. *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 244 (1931), relies upon *Anderson*. *Marietta County v. Valley Nat'l Bank*, 318 U.S. 357, 361 (1943) relies upon *Owensboro* and *Des Moines*. *Colorado Nat'l Bank v. Bedford*, 310 U.S. 41, 50 (1940), relies upon *Owensboro* and *Richardson*. Finally, *Michigan Nat'l Bank v. Michigan*, 365 U.S. 467, 470 (1961), relies upon *Anderson* and *Des Moines*.

¹¹ In this regard, it should be noted that the United States Government has not sought to intervene in this proceeding, or, indeed, even to appear, in order to support Appellant's contention that national banks are immune from nondiscriminatory state taxation.

erwise provide is a sound and well established constitutional principle with which the Supervisors have no quarrel. It is apparent that this Court has held, on a number of occasions dating back to the landmark decision in *M'Culloch v. Maryland*,¹² that national banks are such instrumentalities of the federal government and entitled to this constitutional immunity from state taxation. The holdings of this Court have, however, taken place over a period of one hundred and fifty years during which the banking structure in the United States has undergone numerous and drastic changes. The Supervisors submit that these changes require an extensive re-examination of the position of national banks within the banking structure of the United States to determine if, at the present time, national banks are still instrumentalities of the federal government entitled to constitutional immunity from state taxation.

This Court has recognized the need for re-examination of constitutional determinations especially those which depend for their validity on factual analysis. *Brown v. Board of Education*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537). Constitutional questions frequently depend upon the specific facts presented. Where those facts range materially the Court must again determine whether the constitutional principal when applied to the new facts leads to the same result. As was stated in *Smith v. Allwright*, 321 U.S. 649, 665-6 (1944):

“[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice and this practice has continued to this day. This is particularly true when the decision believed erroneous is the applica-

¹² 17 U.S. (4 Wheat.) 316 (1819).

tion of a constitutional principal rather than an interpretation of the Constitution to extract the principle itself." (Footnotes omitted)¹³

Thus the question here—whether national banks are instrumentalities of the federal government—is precisely the type which must be decided in light of current facts and not merely by reference to prior decisions.

The Supervisors believe that such an examination will result in a finding by this Court, in accord with the findings of the court below, and of the New York Court of Appeals in the *Liberty National Bank Case, supra*, that national banks are no longer instrumentalities of the federal government but are merely private corporations created for profit which, while serving certain government purposes, are not federal instrumentalities constitutionally immune from state taxation. Such a result does not, of course, require that *M'Culloch* be overruled but merely a determination that the doctrine of that case is not applicable to national banks as they exist *today*.

In order to place these earlier decisions in their historical context and determine the current status of national banks with regard to the immunity doctrine, it is helpful to examine briefly the financial history of the United States, particularly with regard to monetary controls and currency issuance.¹⁴ This history will demonstrate that note issuance was the outstanding function of banks in the earlier periods of American banking history and, indeed, banks in which the United States Government had an interest issuing such notes were clearly fiscal agents of the United States through which it was exercising its sovereign powers. By contrast, the deposit function is

¹³ For examples of the application of this doctrine see 321 U.S. at 665 n. 11.

¹⁴ See generally, Board of Governors of the Federal Reserve System, *Banking Studies* (1941); Studenski & Krooss, *Financial History of the United States* (2nd ed 1963); Hackley, "Our Baffling Banking System" 52 Va. L. Rev. 565 (May, 1966).

the principal activity of banks today; notes are no longer issued by privately managed banks (national banks ceased that function in 1935); and monetary control rests primarily with the Federal Reserve System.

1782-1863: the First and Second Banks of the United States; the McCulloch and Osborne decisions. In early American banking the process of extending credit resulted in an enlargement of bank note circulation and not, as at present, in an enlargement of deposits. When loans were made, the borrowers customarily received the amount in bank notes. These notes, transferred from hand to hand, constituted the greater part of the public's means of monetary payment, supplementing gold and silver coin.

The first "Bank of the United States" was chartered by Congress in 1791.¹⁵ The bank was designed by Hamilton as a medium for establishing the finances of the new Government by furnishing a considerable share of the country's circulating currency (over one-fifth), and by assisting in the maintenance of a currency of more or less uniform value throughout the country by promptly presenting for redemption notes of other banks deposited with it.

The charter of the First Bank expired in 1811. The loss of the bank's services as a fiscal agent, coupled with the widespread depreciation of over one-third in the notes of many state banks, led to the formation of the second "Bank of the United States" in 1816.¹⁶ These were the significant features of that Bank:¹⁷

- (1) The federal government subscribed to and owned 20% of its capital stock;
- (2) The federal government appointed 20% of its board of directors;

¹⁵ Act of Feb. 25, 1791, c. 10, 1 Stat. 191.

¹⁶ Act of April 10, 1816, c. 44, 3 Stat. 266.

¹⁷ See Studenski & Krooss, *supra*, n. 14, at pp. 83-84.

- (3) Special congressional committees could examine the bank's affairs;
- (4) Notes issued by the bank were legal tender for federal debts;
- (5) The Secretary of the Treasury was required to deposit all federal funds in the bank;
- (6) The bank was required to transmit funds for the federal government without charge;
- (7) The bank acted as fiscal agent for the federal government and handled its foreign exchange transactions.

This was the bank which was the subject of this Court's decisions in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) and in *Osborne v. United States*, 22 U.S. (9 Wheat.) 738 (1824). There the Court struck down attempts by the States of Maryland and Ohio to tax operations of the bank while, at the same time, exempting state chartered banks. This Court recognized the bank as "the great instrument by which fiscal operations of the government are effected", 22 U.S. 738, 860, and announced the tax immunity doctrine now under consideration in this case.

1863-1913: the creation of national banks; Owensboro; the emergence of the dual banking system. The second Bank of the United States was a victim of politics. Jackson attacked it as both unconstitutional and monopolistic, and in 1832 he vetoed a rechartering of the Bank after the expiration of its charter in 1836.¹⁸ During the Civil War Secretary of Treasury Salmon P. Chase saw two significant advantages to a system of banks chartered by the federal government issuing notes secured only by their holdings of government bonds. Such a system would provide a market for government bonds and hence funds required to finance the Civil War. It would also replace the

¹⁸ See Hammond, *Banks and Politics in America* p. 495, (1957).

highly diversified issues of state bank notes which would be encouraged out of existence by a heavy federal tax. Such was the import of the legislation of Congress in 1863,¹⁹ 1864,²⁰ and 1865.²¹

In *Owensboro National Bank v. Owensboro*, 173 U.S. 664 (1899) this Court was called upon to adjudge the validity of a state franchise tax imposed on a national bank. The Court referred to the principles of *M'Culloch v. Maryland* and *Osborne v. Bank of the United States*, and held that it "follows" from those principles that states are without power to tax national banks except for permissive legislation of Congress which had not been granted for the tax involved.

The Federal Reserve System. In the latter half of the last century, state banks continued to grow (after a temporary drop-off following the banknote tax) because of the development and profitability of deposit banking. By 1892 the number of state banks over took the number of national banks and the dual banking system, as we know it today, had become firmly established.²²

Monetary control, however, was still insufficient to prevent recurring crises, panics and depressions. In 1912 the National Monetary Commission issued its report criticizing the banking system on a number of counts, including a charge that the bond-secured currency was too rigid and inelastic and that there was no way to mobilize cash reserves in times of trouble.²³ This Report led to the Federal Reserve Act of 1913²⁴ which sought to tie

¹⁹ Act of February 25, 1863, c. 58, 12 Stat. 665.

²⁰ Act of June 3, 1864, c. 106, 13 Stat. 99.

²¹ Act of Mar. 3, 1865, c. 78, 13 Stat. 484; See also, Act of July 13, 1866, c. 184, 14 Stat. 146; *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869).

²² *Banking Studies*, n. 14, *supra*, at pp. 15, 418.

²³ S. Doc. No. 243, 62 Cong., 2d Sess. (1912).

²⁴ Act of Dec. 23, 1913, c. 6, 38 Stat. 251.

the multitude of individual banks together by erecting a superstructure consisting of twelve regional Reserve banks which, in turn, were tied together by the Federal Reserve Board in Washington, D.C. A flexible currency was provided through the issuance of federal reserve notes, which are obligations of the United States as well as of the Federal Reserve banks, and secured by a first and paramount lien on all of the assets of the Federal Reserve banks. Existing national bank notes were to be retired gradually over a period of twenty years. In addition to holding the reserve deposits of their member banks, the Federal Reserve banks were to re-discount commercial paper, collect checks for them and supply coin and currency to them. They were also to act as depositories and fiscal agencies of the Government, and the sub-treasuries were abolished in 1920.

The dual banking system. In addition to shifting the monetary and credit control to the Federal Reserve System, Congress commenced to broaden the powers of national banks as private commercial banking corporations, thereby enhancing their ability to compete with state banks. National banks were for the first time permitted to make mortgage loans and given trust powers in the Federal Reserve Act of 1913, both of which authorities were subsequently considerably expanded. The McFadden Act of 1927, which was specifically designed to modernize the National Bank Act so as to make national banks more competitive with state banks, expanded the power of national banks in a number of respects, including their right to purchase investment securities, but, particularly, in connection with the right to branch which its state bank competitors held.²⁵

Legislation in later years continued to enhance the monetary and credit control authority of the Federal Re-

²⁵ *Banking Studies*, *supra* n. 14 at p. 51. See, *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966).

serve System. Thus Congress looked to the Federal Reserve System for emergency action during the "banking holiday" of 1933. The Banking Act of 1935 was principally for the purpose of concentrating responsibility for national credit policies, and strengthening the power of the Federal Reserve Board to coordinate the activities of the twelve Federal Reserve Banks.²⁶

By 1935 the metamorphosis of national banks was complete. As noted earlier, the Federal Reserve Act had authorized the retirement of national bank notes. On August 1, 1935, the last of the federal bonds securing the privilege were retired. Further, while Congress was continuing to expand the general commercial banking powers of national banks, the courts were making it clear that national banks, like state-chartered banks, were subject to ordinary laws applicable to other private corporations such as the Federal anti-trust laws (Sherman and Clayton Act);²⁷ labor laws,²⁸ and securities laws.²⁹

Whereas during this period there was a gradual, but drastic, factual change in the relationship of national banks to the federal government, the doctrine of national bank tax immunity as "federal instrumentalities" was almost ritualistically applied as each case arose dealing with the power of state to tax-national banks. Cases still cited *M'Culloch v. Maryland*, or *Owensboro*, which, in turn, relied upon *M'Culloch*.³⁰ No real independent examination was made of this constitutional doctrine in the light of changed facts, although in at least one case the Court indicated a general awareness of change when it said "(t)hough the national banks' usefulness as an

²⁶ *Banking Studies*, *supra* n. 14, at p. 59.

²⁷ See 15 U.S.C.; *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

²⁸ See 29 U.S.C.; *NLRB v. Bank of America*, 130 F.2d 624 (9th Cir. 1942).

²⁹ See 15 U.S.C. § 78.

³⁰ See n. 10, *supra*.

agency to provide for currency has diminished markedly, their importance as general banks show a constant growth." *Colorado National Bank v. Bedford*, 310 U.S. 41, 48 (1940).

The Supervisors submit that the position of national banks after 1935 is clearly that of a purely private association organized and operating for profit. As was stated in *NLRB v. Bank of America*, 130 F.2d 624, 626-7 (9th Cir. 1942) :

"It [a national bank] is a privately owned corporation, privately managed and operated in the interest of its stockholders. United States Shipping Board Emergency Fleet Corporation v. Western Union Telegraph Co., 275 U.S. 415, 416, 425, 48 S. Ct. 198, 72 L.Ed. 345. The United States did not create it, but has merely enabled it to be created. True national banks are subject to strict regulation and supervision, but so are a host of other private enterprises. It is true, also, that national banks may at times be called upon as aids in carrying out the fiscal policies of the government, but their activities in these respects are occasional and incidental to the primary purpose of the individuals who organize them."

All that remains is the fact that national banks receive their charter from the federal government and are subject to federal supervision in their operations. But the mere fact that a corporation or association receives its authority to operate from the federal government and is regulated by the federal government is clearly insufficient to make such a corporation a "federal instrumentality" constitutionally exempt from state taxation. Airlines, radio and television stations, power transmission companies, motor carriers, railroads, telephone and cable companies all require federal licenses and are regulated by the federal government. Yet none of these corporations has been found to be immune from nondiscriminatory state taxation simply by virtue of their federal license or the fact that they are federally regulated.

Aside from the licensing and supervisory role of the federal government, national banks are virtually identical to state-chartered banks. The following table compares the two types of institutions:

	State Banks	National Banks
Ownership	Private stockholders	Private stockholders
Capitol Source	All private	All private
Control	All private	All private
Insured by	97% by FDIC	100% by FDIC
Primary regulatory agency	State authorities	Comptroller of the Currency
Authority to issue legal tender	No	No
Authorized to act as depositories of federal funds	Yes	Yes
Branch authority	Determined by state law	Determined by state law
Membership in FRS	Permitted	Required

Appellant seizes on one distinction between national banks and state banks—the fact that national banks must join the Federal Reserve System³¹ while membership in the System is optional for state banks³²—and argues that this fact requires the Court to hold that national banks are “federal instrumentalities”. That this distinction hardly requires such a result is evident from an examination of the role of the Federal Reserve System. The Commission on Money and Credit recently summarized the role of the Federal Reserve System as follows:

“The Federal Reserve System is charged with the formulation as well as the execution of monetary policy.

³¹ 12 U.S.C. § 222.

³² 12 U.S.C. § 321.

"The System has a regulated private base, a mixed middle component and a controlling public apex.

"At the apex stands the Board of Governors (FRB).

"The twelve Federal Reserve banks are 'mixed' institutions. * * * Very tangibly, then, as well as legally, the Reserve banks are public service institutions, run at a profit, but not for a profit. Their private 'ownership' is a highly attenuated right. * * * One more item is pertinent: the Reserve banks, their earnings and property are exempt from all taxation, federal and state, except real estate taxes."^{ss}

The "private base" is, of course, the "member banks," that is all national banks and those state banks which join the System. There is no doubt that national bank members are, like state bank members, private associations operated for a profit. Appellant argues, however, that because national banks must be members of the system, unlike state banks which have the option of not joining the system, they should be considered federal instrumentalities immune from state taxation.

If national banks, because of their membership in the System, are instrumentalities of the federal government, then it is only logical that state banks which are members of the System should be similarly treated—for, as we have discussed above, there are no essential differences in the function and operation of the two institutions.

However, the Supervisors submit that membership in the System does not result in a bank becoming an instru-

^{ss} Commission on Money and Credit, *Money and Credit* pp. 81-85 (1961). The Commission was a prestigious group of 27 individuals (including the present Secretary of the Treasury) created and financed by the Ford Foundation, the Merrill Foundation and the Committee for Economic Development to "prepare the first comprehensive survey in half a century of public and private financial institutions, policies, and practices in the United States."

mentality of the federal government. This view is based on an examination of how the System operates. The Commission on Money and Credit describes the operation as follows:

"Of the System's three instruments of general monetary policy—changes in member bank reserve requirements, changes in the rediscount rate, and open market operations—the first is lodged clearly with the FRB. The second, the rediscount rate, is 'established' every two weeks by each Reserve bank, but is subject to the review and determination" of the FRB.

* * *

"The control of open market policy, the third and most flexible instrument, is formally vested not in the Board but in the FOMC [Federal Open Market Committee]."³⁴

It is thus clear that national banks play no direct role in the formation or implementation of federal monetary policy. Nor do they, of course, perform their earlier function of issuing currency.

One final area of examination is necessary, i.e., what *indirect* role, if any, is played by national banks in connection with the above described instruments of the System. First, national banks play no part whatsoever in the use of the System's primary instrument—open market operations. Second national banks play no particular role with regard to the System's rediscount rate. The rediscount rate simply determines the price at which member banks may borrow from the Reserve banks. By lowering the rate the Reserve banks make money available to member banks (and indirectly to non-member banks) more cheaply. National banks may or may not choose to borrow money from Reserve banks at the current rate just as may state member banks.

³⁴ *Id.*

Finally, there remains the area of the System's reserve requirements for member banks. By raising the reserve requirements of its member banks the System contracts the money supply and vice versa. Appellant contends that but for the required membership of the national banks in the System the System would be unable to effectively use this instrument. They posit a situation where none or only a few banks would be members of the System and thus the System's reserve requirement would be applicable to too few banks to have any effect on credit.

This argument will not withstand close scrutiny. First, even assuming it were correct that national banks are the only banks which make "effective" the System's use of the reserve requirement as an instrument of monetary policy, such instrument is only one of the System's methods of implementing government policy. Further, membership in the System is really optional for any bank. No bank is required to operate under a federal charter—it may choose which charter it will operate under at its inception and change charters at any time during its life. A bank always has the *option* of becoming a member of the System or leaving it. Thus, this distinction is minimal and will not support a constitutional holding that a national bank is a federal instrumentality.

Second, as a matter of practical fact, more than 58% of the assets of state commercial banks are in banks which have chosen to be members of the System. See Appendix A. Thus membership is apparently so advantageous that almost all of the large state commercial banks have elected to join the System. Viewed in this light, the requirement that national banks become members of the System while state banks have an option becomes virtually meaningless—a distinction without a difference.

In concluding this portion of this brief, the comments of Mr. Justice Frankfurter on the decision in *M'Culloch v. Maryland* made in his opinion in *Graves v. New York*,

306 U.S. 466, 488-490 (1939), seem particularly pertinent:

"Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

The arguments upon which *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579, rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *M'Culloch v. Maryland*. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' *Id.* at p. 431."

He went on to say that the

"The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this court sits.' *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223, 72 L. ed. 857, 859, 48 S. Ct. 451, 56 A.L.R. 583 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount."

He concluded:

"The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution."

A "fair conception" must lead to the conclusion that national banks can no longer be considered instrumentalities of the federal government for the purpose of tax immunity in the absence of specific Congressional assent. The tax in *M'Culloch* was a discriminatory tax aimed at the heart of the second Bank of the United States, clearly an instrumentality of the United States Government, and patently designed to destroy it. The sales and use taxes here involved are applied to national banks which are private corporations engaged in profit-making activities and standing in full functional parity with state-chartered banks belonging to the Federal Reserve System. Their *current* relationship to the federal government is *light-years* away in quality from that held by the second Bank of the United States.

In view of the foregoing, the Supervisors respectfully submit that national banks can no longer be considered instrumentalities of the federal government for the purpose of tax immunity in the absence of specific Congressional assent.

II. Congress Has Not Prohibited a Nondiscriminatory State Sale and Use Tax on National Banks

The Appellant makes the additional contention that Congress, having passed the enabling act under which national banks may be organized, has the right to immunize those corporations from state taxation and has, in fact, prohibited a sales and use tax on national banks. It bases this argument upon 12 U.S.C. § 548, which was

first enacted in 1864 and amended several times since that date.³⁵

The major support for this argument is the citation of principle cases of this Court (Br. p. 11) which hold that a state may not levy any tax except as set forth by Congress, and that any tax not set forth in 12 U.S.C. § 548 is thereby prohibited. But an analysis of these cases will demonstrate that they rely upon *M'Culloch* or upon *Owensboro*, which in turn relied upon *M'Culloch*.³⁶ This means that these decisions are based upon the doctrine that national banks are instrumentalities of the federal government for the purpose of tax immunity and may not be taxed in the absence of specific Congressional assent. The Supervisors argue in the prior section of this brief, however, that these decisions should now be reconsidered by this Court based on *current facts* and found to be no longer tenable.

Thus the decisional foundation for Appellant's position is conditioned upon the continuance of the outdated tax immunity doctrine. Appellant would appear to be concerned about this fact for it is quick to offer additional arguments demonstrating Congressional intent to specifically prohibit the application of sales and use taxes to national banks. Thus it points to an unsuccessful legislative effort in 1950 to amend 12 U.S.C. § 548 so as to permit such taxes, as indicative of prior Congressional intent to prohibit such taxes. (Br. pp. 20-21). But this legislative effort can also mean nothing more than that

³⁵ Act of June 3, 1864, c. 106, § 41, 13 Stat. 111. A minor amendment was made in the Act of Feb. 10, 1868, c. 7, 15 Stat. 34 and Congress incorporated the provision as section 5219 of the Revised Statutes in 1878. In the Act of March 4, 1923, 42 Stat. 1499, Congress clarified the concept of "competing capital" and allowed states to tax national bank dividends and income. Finally, in 1926, Congress allowed states to impose franchise and excise taxes on national banks based on their entire income. Act of March 25, 1926, c. 88, 44 Stat. 223.

³⁶ See n. 10, *supra*.

the bills' proponents were laboring under the erroneous view that the doctrine of constitutional immunity discussed in the preceding section of this brief is valid under current facts. See *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-9 (1962). It also points to legislation in which Congress has specifically subjected corporations which it has created to nondiscriminatory state, municipal, and local taxation as indicative of the fact that a limited authority to tax cannot be construed as a broad power to tax. (Br. p. 20). But there are many federally licensed corporations with regard to which Congress has remained completely silent, and states have nevertheless been permitted a broad nondiscriminatory right of taxation.³⁷ Finally, Appellant has delved deeply into the legislative history of the original enactment of 12 U.S.C. § 548 in 1864 in order to supply the specific prohibition against sales and use taxes which the plain language of 12 U.S.C. § 548 does not contain. (Br. pp. 12-17). But these debates reflect a considerable discussion of the constitutionality of state power to tax national banks,³⁸ and merely demonstrate Congressional intent to put the 1864 statute in line with the *dicta* of Justice Marshall in *M'Culloch v. Maryland* that Maryland had an original power to tax the interest of its citizens in the second Bank of the United States, with the added provision that this tax was to be applied in a nondiscriminatory manner.³⁹ This Court has indicated that the purpose of that statute was to assure a nondiscriminatory application of the named taxes, or a "policy of equalization" between state and national banks. See quotations from *Lewis v. Fidelity & Deposit Co.*, p. 7, *infra*, and *Mercantile National Bank v. New York*, at p. 7, *supra*.

³⁷ E.g., radio and television stations, airlines, railroads, etc.

³⁸ Cong. Globe, 38th Cong., 1st Sess., pp. 1412-15, 1890, 1895, 1956, 2622, 2639, 2727.

³⁹ 17 U.S. (4 Wheat.) at 436.

Appellant's argument, therefore, that Congress intended a specific prohibition of the application of sales and use taxes to national banks in 12 U.S.C. § 548, in spite of the fact that there is no such prohibition therein set forth, must be viewed within the trend of recent decisions of this Court to deny an implied immunity from state taxation to essentially private persons, and to insist on a clear-cut statement of Congressional prohibition if states are to be denied the right to impose nondiscriminatory taxes which do not interfere with the operations of such persons. The court below made that point succinctly in its opinion as follows:

"Such immunity, however, must be expressly conferred. The Supreme Court of the United States has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co. v. Helvering*, *Comm'r. of Int. Rev.*, 307 U.S. 57, 60. *Oklahoma Tax Commn. v. United States*, 319 U.S. 598, 606. This rule has been rigidly applied in the area of inter-governmental immunity. Congress has not created an immunity here by affirmative action, and '[t]he immunity formerly said to rest on constitutional implication cannot now be resurrected in the form of statutory implication. *Oklahoma Tax Commn. v. United States*, 319 U.S. 598, 604." *Oklahoma Tax Commn. v. Texas Co.*, 336 U.S. 342, 366. 'Silence of Congress implies immunity no more than does the silence of the Constitution. . . . [I]f it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.' *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480."

Appellant concedes that the tax here is nondiscriminatory. Appellant does not claim, nor could it claim, that the application of the tax to national banks would adversely affect, or conflict with, its operations. Appellant does not claim, nor could it claim, that the imposition of the tax will result in any burden on the federal govern-

ment. A national bank is 100% privately owned—additional expenses fall on the private owners not the federal government.

Accordingly, no one, not even Appellant, can claim that the taxes here involved in any way disturbs the essential freedom of the government in the performance of its functions. On the other hand, no one, not even Appellant, can deny that permitting national banks an exemption from such taxes not accorded their state tax competitors, runs counter to a sound tax policy of equality which dictates that all business for profit within a state share the cost of government services provided to all, and is, therefore, unduly limiting the taxing power which is equally essential to both national and state governments under our dual system.

In conclusion, the Supervisors contend that Congress did not intend to prohibit states from applying nondiscriminatory sales and use taxes to national banks. The statute does not contain any such prohibition. The only support for Appellant's contention lies with a no longer tenable legal and historical anachronism that national banks are federal instrumentalities entitled to tax immunity.⁴⁰

⁴⁰ The preceding portion of this brief demonstrating that Appellant errs in contending Congress specifically prohibited states from applying sales and use taxes to national banks makes it unnecessary to consider in detail the authority of Congress to do so. The Supervisors fully recognize, of course, the right of Congress to create a tax immunity for "federal instrumentalities." However, if as contended in the preceding section of this brief, national banks are no longer federal instrumentalities, a serious question arises as to the extent of Congressional power to immunize national banks from state taxation. This Court has not decided this question. See *Graves v. New York*, 306 U.S. 466, 478 (1939). The Supervisors would have no difficulty with a Congressional prohibition of state taxes which are discriminatory. However, they would have difficulty in ascertaining the constitutional base for Congressional action in invading the sovereign right of a state to tax to simply prohibit all non-discriminatory state taxation.

The final section of this brief will separately discuss an additional indication that Congress did not intend the prohibition for which Appellant argues. A sales and use tax applicable to state banks, but not to national banks, places state banks at a competitive disadvantage. A construction of 12 U.S.C. § 548 to render such a result is utterly out of harmony with the rest of the statute which is, as this Court has declared, a "policy of equalization" between national and state banks.

III. Congress Has Recognized the Fact of a Dual Banking System and Has Fostered and Encouraged Competitive Equality Between the Two Systems.

It is apparent that in order for the dual banking system of the United States, consisting of state-chartered banks and national banks chartered under the National Bank Act of 1864 (now 12 U.S.C.A. §§ 21-213), to continue to function as such there must be a competitive equality in at least the most important areas of competition between the two systems. If such were not the case, one or the other of the two types of banks, the one with the competitive weight against it, would substantially be driven out of existence, either through failures or conversions to the other class of banking.

Congress solved the foregoing problem in a very practical way:

First, it decided upon a "policy of equalization" between national and state banks by adopting state law as the standard for national banks in most of the important competitive areas. *Lewis v. Fidelity & Deposit Co.*, 292 U.S. 559 (1934). In that case the question was whether a 1930 amendment to the National Bank Act authorizing a national bank to "give security" for state deposits meant merely a pledge of specific assets or a general lien upon the bank's assets. State banks, competitors of national banks for such deposits, had the right to give the more impressive security of a general lien. This Court ruled

in favor of the general lien on the basis of the "policy of equalization" which it held Congress had adopted in the National Bank Act. At 292 U.S. 564-565, Mr. Justice Brandeis, writing for the Court, said:

"For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits. The *policy of equalization* was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation. In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization." (Footnotes omitted.) (Emphasis supplied.)

Thus, some of the more important instances of the specific adoption of state law in the National Bank Act are as follows: (a) *Branches*. Section 36(c) adopts state law as the standard for the establishment of branches by national banks. 44 Stat. 1228-29 (1927), as amended, 12 U.S.C. § 36(c) (1964). (b) *Fiduciary powers*. The Comptroller may grant a permit to national banks, "when not in contravention of State or local law," to "act as a trustee . . . or in any other fiduciary capacity, in which State banks . . . which come into competition with National banks are permitted to act under the laws of the State in which the National Bank is located." 76 Stat. 668 (1962), 12 U.S.C. § 92(a) (1964). (c) *Interest on loans*. National banks may charge interest on loans allowed by the law of the state where the bank is located if such a rate is greater than 1% in excess of the discount rate on ninety-day paper in effect at the local federal reserve bank. 48 Stat. 191 (1933), as amended, 12 U.S.C. § 85 (1964). (d) *Interest on time and savings deposits*. National banks may not pay a greater rate of interest than the maximum rate authorized by law upon

such deposits by banks organized under the laws of the state in which the national bank is located. 44 Stat. 1224-25, 12 U.S.C. § 371 (1964). (e) *Capitalization.* In certain instances state law is the measure of allowable capitalization of new national banks. 48 Stat. 185 (1933), 12 U.S.C. § 51 (1964). (f) *Merger and conversion.* No conversion of a national bank to a state bank, or its merger with a state bank, may take place in "contravention of the law of the State in which the National banking association is located." 64 Stat. 456 (1950), 12 U.S.C. § 214c (1964).

Secondly, in addition to specifically applying state law to national banks in many instances, Congress did not seek to occupy the field so as to preclude the application of state laws to national banks which do not conflict with federal law. Sometimes it made a specific reservation of power, as for example, the reservation of powers over bank holding companies, and bank subsidiaries, in the Bank Holding Company Act of 1956, 70 Stat. 138 (1956), 12 U.S.C. § 1846 (1964). The courts have also enunciated this general principal on a number of occasions. Thus in *First National Bank v. Missouri*, 263 U.S. 640 (1924), this Court held—at a time prior to the passage of Section 36(c) of the National Bank Act—that a Missouri statute forbidding branch banks was applicable to national banks. Similarly, in *Lewis v. Fidelity & Deposit Co.*, a portion of which opinion is quoted above illustrating the "policy of equalization," this Court upheld the applicability of provisions of Georgia law relating to duties of a depository. 292 U.S. 559, 565-6. See, also, *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944); *Chase Securities Corp. v. Husband*, 302 U.S. 660 (1938); *McClellan v. Chipman*, 164 U.S. 347 (1896).

The "policy of equalization" set forth above was affirmed by this Court only last term. In *First National*,

Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966); this Court was called upon to construe the branch provisions of Section 36(c) of the National Bank Act. This Court concluded:

“[I]t appears clear from this resume of legislative history of Section 36(c) (1) and (2) that Congress intended to place national and state banks on a basis of ‘competitive equality’ insofar as branch banking was concerned. Both sponsors of the applicable banking act, Rep. McFadden and Sen. Glass so characterized the legislation. It is not for us to so construe the Acts as to frustrate this clear cut purpose so forcefully expressed by both friend and foe of the legislation at the time of its adoption. To us it appears beyond question that the Congress was continuing its policy of equalization first adopted in the National Bank Act of 1864.” (Emphasis supplied.)

This “policy of equalization” has been a two-way street. In some instances it has resulted in the protection of national banks from a competitive advantage asserted by state banks. E.g., *Lewis v. Fidelity & Deposit Co.*, *supra*, (security for deposits in state banks). In other instances it has resulted in the protection of state banks from a competitive advantage asserted by national banks. E.g., *First National Bank v. Walker Bank & Trust Co.*, *supra* (branching). In both instances, it is apparent that without the “policy of equalization”, the dual banking system as we know it today could not survive. Both the National Bank Act,⁴¹ and state statutes, permit a free conversion of state banks to national banks, and vice versa. Whenever one class of banks is faced with a major competitive disadvantage with the other, or, indeed, even a conglomeration of small competitive disadvantages, conversions will follow.

The foregoing demonstrates that throughout the years Congress has acted to foster equality between the state

⁴¹ 12 U.S.C. §§ 35, 214a.

and national systems. In this framework, it would be erroneous to impute to Congress an intent to handicap state banks vis-a-vis their national bank competitors through unequal taxation. That is the import of Appellant's contention herein which the Supervisors respectfully request this Court to reject.

CONCLUSION

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts below was correct and should be affirmed.

Respectfully submitted,

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March 29, 1968

APPENDIX A

THE DUAL BANKING SYSTEM
(as of June 30, 1967)

State Banks	Number of Banks	Percent All Banks	Total Assets	Percent All Assets
Commercial	8,982	63.0	\$172,752	36.0%
Mutual	505	3.5	64,153	13.4
Total	<u>9,487</u>	66.5	236,905	49.4
National Banks	4,780	33.5	242,685	50.6
All Banks	<u>14,267</u>	100	479,590	100

State Banks

Commercial:

Federal Reserve Members	1,327	14.8	\$100,220	58.0
Insured Non-Members	7,426	82.7	69,012	39.9
Non-Insured	229	2.5	3,520	2.1
Total	<u>8,982</u>	100	172,752	100
Mutual Savings Banks	505		64,153	
Total	<u>9,487</u>		236,905	

NOTES: All member-banks of the Federal Reserve System are insured by the FDIC, 12 U.S.C. § 1814. All national banks are members of the Federal Reserve System, 12 U.S.C. §§ 222, 223. All mutual savings banks are state chartered. Of the 505 mutual savings banks, 334 are insured by the FDIC and 171 are non-insured.

SOURCE: Report of Call No. 80, Federal Deposit Insurance Corporation (1967) pp. 2-3.

APPENDIX B

STATE SALES AND/OR USE TAXES

States Imposing Sales and/or Use Taxes		Applicable to Purchases by National Banks*
Alabama	No	Ala. Dept. of Rev. Rule B1-021, reissued January, 1961.
Arizona	No	Ariz. Attorney General Opinion, Nov. 28, 1956.
Arkansas	No.	Director, Sales Tax Division, Letter of July 31, 1952.
California	Yes	State Tax Counsel Ruling, June 4, 1964.
Colorado	No	Colo. Rev. Rule No. 41.
Connecticut	No	Letters from Tax Commissioner to CCH, April 12, 1960; Feb. 3, 1959.
District of Columbia	Yes	D.C. Code § 47-2605(a) (1967); D.C. Sales Tax Reg. § 201(g).
Florida	Yes	Fla. Sales & Use Tax Rule 318- 1.65, revised Nov. 20, 1965.
Georgia	No	Ga. Rev. Rule 560-12-2.111.
Hawaii	No	Haw. Rev. Laws, § 117-20(a) (1955).
Idaho	Yes	Id. Code § 63-3619 (Supp. 1967).**
Illinois	Yes	<i>Continental Illinois National Bank & Trust Co. v. Hulman</i> , County Superior Ct., Apr. 23, 1965.
Indiana	No	Ind. Sales Tax Circular ST-45, Aug. 7, 1964.
Iowa	Yes	Iowa Sales & Use Rule No. 50.
Kansas	Yes	State Rev. Comm. Bul., Dec., 1950.
Kentucky	Yes	Ky. Code § 139.200 (1962).**
Louisiana	No	La. Rev. Bul., Nov. 25, 1943.
Maine	No	Me. Sales & Use Tax Instruction Bul. No. 16.1.

STATE SALES AND/OR USE TAXES—(Continued)

<u>States Imposing Sales and/or Use Taxes</u>		<u>Applicable to Purchases by National Banks*</u>
Maryland	No	<i>Farmers & Mechanics-Citizens National Bank v. Comptroller, Frederick County Cir. Ct., No. 3598 Misc. Nov. 2, 1960.</i>
Massachusetts	Yes	Mass. Sales & Use Tax Emergency Reg. No. 6, May 31, 1966.
Michigan	Yes	Mich. Sales & Use Tax Rule 29.
Minnesota	Yes	Minn. Stats. Ann. § 279A.02 (Supp. 1967).**
Mississippi	Yes	Miss. Sales & Use Tax Rule 26, June 1, 1958.
Missouri	No	Mo. Sales/Use Tax Rule No. 12.
Nevada	Yes	Attorney General Opinion, Dec. 8, 1961.
Nebraska	Yes	Neb. Sales & Use Tax Rule TC-1-72.
New Jersey	Yes	N.J. Stats. Ann. § 54:32B-3 (Supp. 1967).**
New Mexico	Yes	Letter, Chief Counsel, to CCH, May 2, 1962.
New York	Yes	N.Y. Taxation Code Art. 59, § 1105 (1966).**
North Carolina	No	N.C. Sales & Use Tax Reg. 48.
North Dakota	Yes	N.D. Sales Tax Rule No. 17 (as amended July 1, 1953).
Ohio	No	Ohio Sales & Use Tax Rule TX-15-22.
Oklahoma	No	Opinion of Attorney General, July 11, 1939.
Pennsylvania	Yes	Pa. Sales & Use Tax Reg. 206 (2).
Rhode Island	Yes	R.I. Sales & Use Tax Reg., Released March 8, 1954.
South Carolina	Yes	S.C. Sales & Use Tax Rule S-R-42.

STATE SALES AND/OR USE TAXES—(Continued)

States Imposing Sales and/or Use Taxes		Applicable to Purchases by National Banks*
South Dakota	Yes	S.D. Code § 57.3201 (Supp. 1960).**
Tennessee	Yes	Tenn. Code Ann. § 67-3003 (Supp. 1967).**
Texas	No	Texas Sales & Use Tax Ruling No. 95-0.35.
Utah	No	Utah State Tax Reg. S54.
Virginia	Yes	Va. Sales & Use Tax Reg. § 1-12.
Washington	Yes	Wash. Rev. Act Rule 190.
West Virginia	No	W. Va. Retail Sales & Use Tax Reg. CUT § 1.28.
Wisconsin	No	Memorandum. Ass't Commis- sioner of Taxation, February 24, 1966.
Wyoming	No	Letter to CCH from Special As- sistant Attorney General, Oct. 3, 1958.

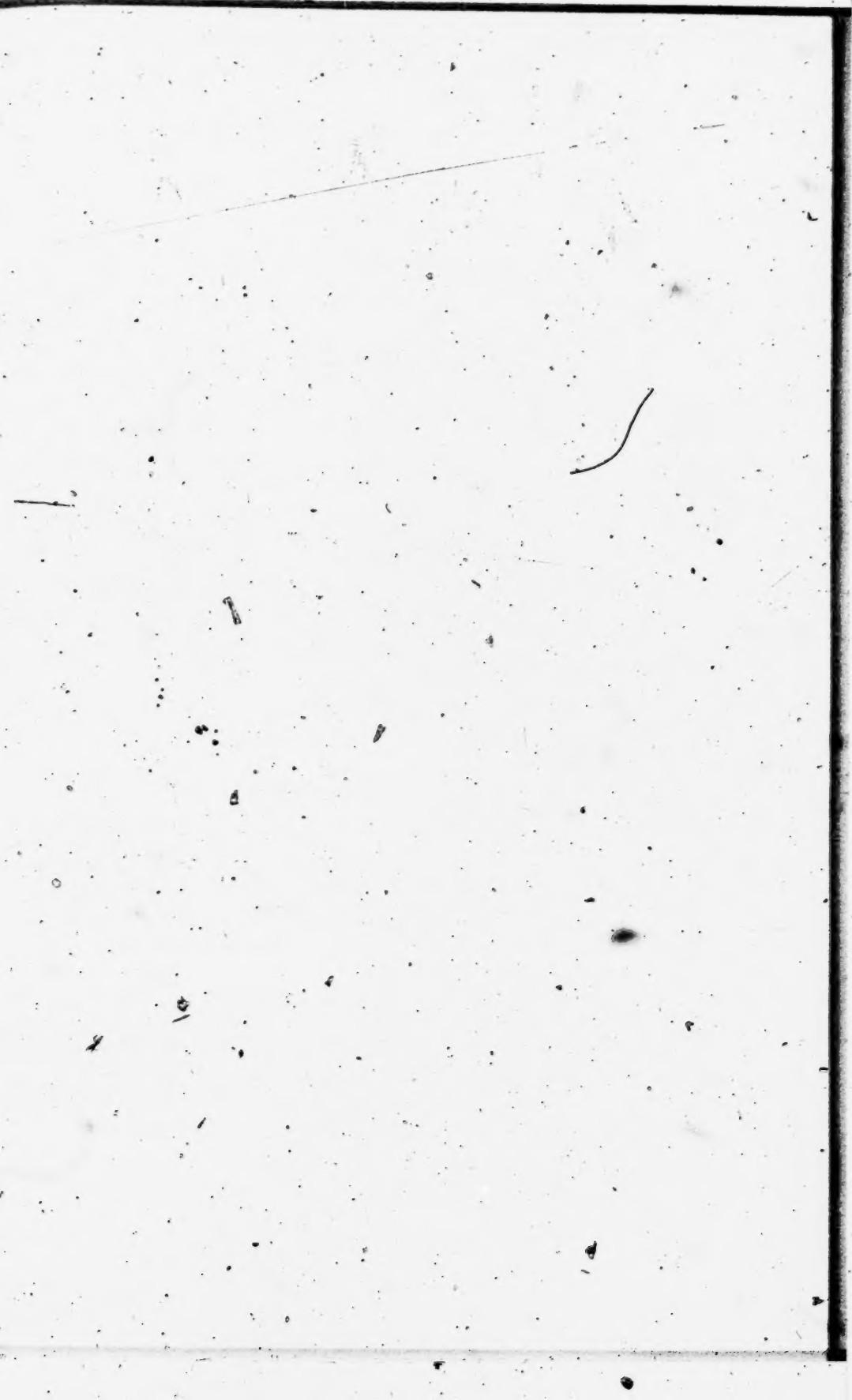
* All citations available in Commerce Clearing House, *All States Sales Tax Reporter* ¶7.125, *et. seq.*

** Citation is to section imposing sales and/or use tax on all taxable sales, without an exception for national or state banks.

Note 1. The rationale for exempting national banks from sales and/or use taxes, when stated, is that national banks are constitutionally exempt. See, e.g., Alabama Department of Revenue Rule B1-021, reissued January 1961; Opinion of Attorney General of Georgia, May 10, 1951; Maine Sales & Use Tax Instruction Bulletin No. 16.1.

Note 2. The following states specifically exempt state banks from sales and/or use taxes: Colorado (Colorado Revenue Rule No. 410); Georgia (Georgia Revenue Rule 560-12-2.111); Hawaii (Haw. Rev. Laws, § 117.20(b) (1955)); Louisiana (Louisiana Act No. 445 (1966)); Texas (Texas Sales & Use Tax Rule 95-0.37, as amended, June 10, 1965).

Note 3. The following states impose no sales or use taxes: Alaska, Delaware, Montana, New Hampshire, Oregon and Vermont.



SUPREME COURT OF THE UNITED STATES

No. 755.—OCTOBER TERM, 1967.

First Agricultural National Bank
of Berkshire County,
Appellant,
v.
State Tax Commission. } On Appeal From the
Supreme Judicial
Court of Massa-
chusetts.

[June 17, 1968.]

MR. JUSTICE BLACK delivered the opinion of the Court.

The principal issue raised by this case concerns the extent to which States may tax a national bank. The Supreme Judicial Court for the Commonwealth of Massachusetts held that appellant, First Agricultural National Bank of Berkshire County, was subject to Massachusetts' recently enacted sales and use taxes¹ on purchases for its own use of tangible personal property. For reasons to be stated we believe this decision was erroneous, and we reverse.

As long ago as 1819, in the historic case of *McCulloch v. Maryland*, 4 Wheat. 316, this Court declared unconstitutional a state tax on the bank of the United States since, according to Chief Justice Marshall, this amounted to a "tax on the operation of an instrument employed by the government of the Union to carry its powers into execution." 4 Wheat., at 436–437. A long line of subsequent decisions by this Court has firmly established the proposition that the States are without power, unless authorized by Congress, to tax federally created, or, as they are presently called, national, banks. *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 668; *Des Moines Nat. Bank v. Fairweather*, 263 U. S. 103, 106; *First Nat.*

¹ St. 1966, c. 14, §§ 1 and 2.

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Bank v. Hartford, 273 U. S. 548, 550; *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U. S. 239, 244. As recently as 1966, MR. JUSTICE FORTAS, speaking for a unanimous Court, thought this ancient principle so well established that he used national banks as an example in holding the American Red Cross immune from state taxation:

"In those respects in which the Red Cross differs from the usual government agency—*e. g.*, in that its employees are not employees of the United States, and that governmental officials do not direct its everyday affairs—the Red Cross is like other institutions—*e. g.*, *national banks*—whose status as tax-immune instrumentalities of the United States is *beyond dispute*." *Department of Employment v. United States*, 385 U. S. 355, 360. (Emphasis added.)

The decision below recognized the strong precedents against taxation, but the Massachusetts Supreme Judicial Court was of the opinion that the status of national banks has been so changed by the establishment of the Federal Reserve System² that they should no longer be considered nontaxable by the States as instrumentalities of the United States. Essentially the reasoning of the Supreme Judicial Court is that under present-day conditions and regulations there is no substantial difference between national banks and state banks; and the implication of this is, of course, that national banks lack any unique quality giving them the character of a federal instrumentality. Because of pertinent congressional legislation in the banking field, we find it unnecessary to reach the constitutional question of whether today national banks should be considered nontaxable as federal instrumentalities.

² The Federal Reserve Act of December 23, 1913, c. 6, 38 Stat. 251.

As will be seen, Congress has been far from reluctant to pass legislation in the banking field. There are important committees on banking and currency in both Houses which continually monitor banking affairs and propose new legislation when changes are felt to be needed. For purposes of this case, the most important piece of banking legislation is 12 U. S. C. § 548³ which originated as part of the Act of June 3, 1864, c. 106, § 41, 13 Stat. 111. This section allows state taxation of national banks in any one of four specified ways in addition to taxes on their real estate. Before this legislation was originally enacted in 1864, there was sharp controversy in the Congress over the extent to which the States should be allowed to tax national banks. A vocal opponent to *any* state taxation of national banks was the powerful Senator Sumner of Massachusetts.

"If you allow the State to interfere with the proposed system [of national banks] in any way, may they not embarrass it? Where shall they stop? Where will you run a line?"

³ This section provides in pertinent part:

"The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income. . . .

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others. . . .

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed."

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"Now, sir, every consideration, every argument which goes to sustain this great judgment [*M'Culloch v. Maryland*] may be employed against the proposed concession to the States of the power to tax this national institution in any particular, whether directly or indirectly." Cong. Globe, 38th Cong., 1st Sess., 1893-1894 (1864).

On the other side, proposed amendments expressly permitting much broader state and local taxation of national banks were introduced, debated, and rejected by the Congress. Among these was an amendment introduced in the House which would have made national banks subject, without exception, to all state and local general taxes on personal as well as real property:

"And the said associations or corporations shall severally be subject to State and municipal taxation upon their real and personal estate, the same as persons residing at their respective places of business are subject to such taxation by State laws." Cong. Globe, 38th Cong., 1st Sess., 1392 (1864).

The result of this conflict was that the legislation, when finally passed, was a compromise which permitted state taxation of national banks in certain ways, but prohibited all other forms of state taxation. Senator Fessenden, Chairman of the Finance Committee, clearly defined the compromise that was being enacted.

"If the Senator reads this bill he will perceive that all of the power of taxation upon the operations of the bank itself, all upon the circulation, all upon the deposits, all upon everything which can properly be made a tax is reserved to the General Government; that the States cannot touch it in any possible form; that they are limited and controlled; the simple right is given to them to say that the property which their own citizens have invested in it shall contribute

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to State taxation precisely as other property.⁴
Cong. Globe, 38th Cong., 1st Sess., 1895 (1864).

It seems clear to us from the legislative history that 12 U. S. C. § 548 was intended to prescribe the only ways in which the States can tax national banks. And this is certainly not a novel interpretation of the section, as shown by previous decisions of this Court. As early as 1899 the Court declared:

"This section [R. S. § 5219, 12 U. S. C. § 548], then, of the Revised Statutes is the measure of the power of a State to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void." *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 669.

A more complete explanation of § 548 and its meaning appears in this Court's opinion in *Bank of California v. Richardson*, 248 U. S. 476, where it was said:

"There is also no doubt from the section [R. S. § 5219, 12 U. S. C. § 548] that it was intended to comprehensively control the subject with which it dealt and thus to furnish the exclusive rule governing state taxation as to the federal agencies created as provided in that section. . . .

"Two provisions in apparent conflict were adopted. First, the absolute exclusion of power in the States to tax the banks, the national agencies created, so as to prevent all interference with their operations, the integrity of their assets, or the administrative governmental control over their assets. Second, preservation of the taxing power of the several States so as to prevent any impairment thereof from arising

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from the existence of the national agencies created, to the end that the financial resources engaged in their development might not be withdrawn from the reach of state taxation. . . .

"The first aim was attained by the nonrecognition of any power whatever in the States to tax federal agencies, the banks, except as to real estate specially provided for, and, therefore, the exclusion of all such powers. The second was reached by a recognition of the fact that, considered from the point of view of ultimate and beneficial interest, every available asset possessed or enjoyed by the banks would be owned by their stockholders and would be, therefore, reached by taxation of the stockholders as such. . . ."

248 U. S., at 483.

Finally, so there can be no doubt, consider these words of the Court in *Des Moines Bank v. Fairweather*, 263 U. S. 103:

"This section [R. S. § 5219, 12 U. S. C. § 548] shows, and the decisions under it hold, that what Congress intended was that national banks and their property should be free from taxation under state authority, other than taxes on their real property and on shares held by them in other national banks; and that all shares in such banks should be taxable to their owners, the stockholders, much as other personal property is taxable. . . ." 263 U. S., at 107.

Thus, at least since the *Owensboro* decision, *supra*, in 1899, it has been abundantly clear that 12 U. S. C. § 548 marks the outer limit within which States can tax national banks. Now this Court is asked to change what legislative history and prior decisions have established is the precise meaning of an Act of Congress. This we cannot do. For, as we pointed out above, the banking field has traditionally been an area of particular con-

gressional concern marked by responsive legislation to new problems. This can be illustrated by the history of § 548 alone. It was originally passed in 1864 because the 1863 Currency Act⁴ contained no provision for state taxation of national banks or their shares. In 1868 a technical amendment was made to the section.⁵ Then in 1923 a substantive amendment was made which, among other things, authorized the state taxation of national bank income and dividends.⁶ Another important part of this amendment was the declaration that "bonds, notes, or other evidences of indebtedness" in the hands of individual citizens were not to be considered "moneyed capital . . . coming into competition with the business of national banks." Just two years before, this Court had ruled in *Merchants' Nat. Bank of Richmond v. Richmond*, 265 U. S. 635 (1921), that such bonds and notes were moneyed capital in competition with national banks and thus covered by § 548. Senator Pepper, who spoke for the amendment, made clear that it was offered as a response to this Court's decision which had placed an erroneous interpretation on the section.⁷ Then again in 1926, § 548 was amended to permit States to levy franchise and excise taxes on national banks measured by the entire income (including income from tax-exempt securities) of the banks.⁸ Finally, in 1950, a bill was sent to the Senate Committee on Banking and Currency which expressly permitted the levying of state sales and use taxes on national banks, but Congress did not pass it.⁹

⁴ Act of February 25, 1863, c. 58, 12 Stat. 665.

⁵ Act of February 10, 1868, c. 7, 15 Stat. 34.

⁶ Act of March 4, 1923, c. 267, 42 Stat. 1499.

⁷ 64 Cong. Rec. 1454 (1923).

⁸ Act of March 25, 1926, c. 88, 44 Stat. 223.

⁹ See Hearings on S. 2547 before the Subcommittee on Federal Reserve Matters of the Senate Committee on Banking and Currency, 81st Cong., 1st Sess., 9 (1950).

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Because of § 548 and its legislative history, we are convinced that if a change is to be made in state taxation of national banks, it must come from the Congress, which has established the present limits.

With this primary question out of the way, there is one additional issue which must be resolved. The court below held, contrary to appellant's contention, that the Massachusetts sales tax is not imposed upon the bank as a purchaser, but is a tax upon vendors who sell tangible personal property to the bank. Of course if this is true, the bank cannot object if a particular vendor decides to pass the burden of the tax on to it through an increased price. But if this is not true, and if the tax is on the bank as a purchaser, then, because it is a national bank, appellant is exempt under 12 U. S. C. § 548. Because the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the state court's characterization of the tax. See *Society for Savings v. Bowers*, 349 U. S. 143, 151, and the cases cited therein. And essentially the question for us is, on whom does the incidence of the tax fall. See *Kern-Limerick, Inc. v. Scurlock*, 347 U. S. 110, 121-122. Also see *Carson v. Roane-Anderson Co.*, 342 U. S. 232.

It would appear to be indisputable that a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser. See *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, 99. Subsection 3 of the Massachusetts sales tax provides:

"Reimbursement for the tax hereby imposed shall be paid by the purchaser to the vendor and each vendor in this commonwealth shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed by this section, or an amount equal as nearly as possible or practicable

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to the average equivalent thereof; *and such tax shall be a debt from the purchaser to the vendor*, when so added to the sales price, and shall be recoverable at law in the same manner as other debts." St. 1966, c. 14, § 1, subsec. 3. (Emphasis added.)

This subsection reads to us as a clear requirement that the sales tax be passed on to the purchaser. And this interpretation is reinforced by subsection 23 which prohibits as unlawful advertising the holding out by any vendor that he will assume or absorb the tax on any sale that he may make. We cannot accept the reasoning of the court below that simply because there is no sanction against a vendor who refuses to pass on the tax (assuming this is true), this means the tax is on the vendor. There can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended for this sales tax to be passed on to the purchaser. For our purposes, at least, that intent is controlling. And it seems clear to us that the force of the law, especially the language in subsection 3, is such that, regardless of sanctions, businessmen will attempt, in their everyday commercial affairs, to conform to its provisions as written.

For these reasons we reverse and hold that appellant is immune from both the Massachusetts use and sales taxes.

Reversed.

MR. JUSTICE FORTAS took no part in the consideration or decision of this case.



SUPREME COURT OF THE UNITED STATES

No. 755.—OCTOBER TERM, 1967.

First Agricultural National Bank
of Berkshire County,
Appellant,

v.
State Tax Commission.

On Appeal From the
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chusetts.

[June 17, 1968.]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

I would make clear that the Constitution of its own force does not prohibit Massachusetts from applying its uniform sales and use taxes to, among other things, appellant's wastebaskets.¹ It seems to me necessary to decide that constitutional question in order properly to interpret 12 U. S. C. § 548, upon which the Court bases its decision. Moreover, the refusal to decide the issue gives further life to a largely outmoded doctrine.

Mr. Justice Brandeis rightly cautioned that "[i]n cases involving constitutional issues . . . this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its judicial authority may . . . 'depend altogether on the force of the reasoning by which it is supported.'"² I think that in light

¹ The *reductio ad absurdum* in the text is, unlike most, somewhat accurate. One item upon which, appellant informed its supplier, it should not have to pay the sales tax was a wastebasket (as well as, e. g., "1 Box 5 x 7 Index Cards"). The record does not reveal the extent of appellant's liability for use taxes; appellant paid a total of \$575.66 in sales taxes for the three months of the year 1966 that are specifically at issue here.

² *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 412-413 (1932) (dissenting opinion), quoting from *Passenger Cases*, 7 How. 283, 470 (1849) (Taney, C. J.).

of the present functions and role of national banks that they should not in this day and age be considered constitutionally immune from nondiscriminatory state taxation, and that § 548 should not be construed as giving them a statutory immunity from the taxes here involved.

I.

A. The starting point of the constitutional inquiry is, of course, *M'Culloch v. Maryland*, 4 Wheat. 316 (1819). That case involved a state statute applicable to any bank established in Maryland "without authority from the state," i. e., the Second Bank of the United States, chartered by Congress in 1816. It prohibited the circulation of notes (currency) by such a bank except on payment of a 2% stamp tax, or, alternatively, upon the payment annually to the State of \$15,000. Substantial monetary penalties were provided for violations of the statute, for which the State had sued cashier M'Culloch. In a celebrated opinion Chief Justice Marshall, a principal architect of our federalism, struck down the Maryland statute.

In *Osborn v. Bank of the United States*, 9 Wheat. 738 (1824), *M'Culloch* was applied to strike down an Ohio statute that attempted to extract an annual tax of \$50,000 from each branch of a business operating in the State without its authority. The statutes found unconstitutional in both of those cases were patently discriminatory against the Second Bank of the United States (the Ohio statute specifically mentioned it), for the taxes did not apply to state-chartered banks. Chief Justice Marshall, however, did not limit his opinions in the two cases to discriminatory taxation, and they were applied by the Court in *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664 (1899), with little independent analysis to hold that Kentucky could not collect a nondiscriminatory franchise tax from a national bank. There was no discussion of

the possible differences between federal functions performed by the kind of national bank involved there, which existed by virtue of legislation enacted in 1863 and 1864, and the quite distinct functions performed by the Second Bank of the United States involved in *M'Culloch* and *Osborn*.

Virtually all of the later cases in which national banks have been held to be federal instrumentalities immune from state taxation depend upon these three cases. One could, and perhaps should, read *M'Culloch* and *Osborn* simply for the principle that the Constitution prohibits a State from taxing discriminatorily a federally established instrumentality. On that view, Chief Justice Marshall's statement that "the power to tax involves the power to destroy," *M'Culloch v. Maryland, supra*, at 431, did not relate to a principle entirely necessary to the decision. As Mr. Justice Frankfurter pointed out in reference to what he called that "seductive cliche":

"The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: 'The power to tax is not the power to destroy while this Court sits.'"³

Absent an examination of the differences between the bank involved in *Owensboro* and the Second Bank of the United States involved in *M'Culloch* and *Osborn*, the *Owensboro* decision might be justified upon either of the following grounds: its alternative holding that the statute that is now § 548 constituted congressional delineation of the permissible scope of the power of the State to tax a national bank, or perhaps that the particular franchise tax was invalid as applied because it was based upon a valuation that included the national bank's re-

³ *Graves v. New York, ex rel. O'Keefe*, 306 U. S. 466, 489, 490 (1939) (concurring opinion), quoting from *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223 (1928) (dissenting opinion).

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quired investment in nontaxable bonds of the United States.⁴ Or one might view *Owensboro*, in holding a nondiscriminatory tax invalid, as simply incorrect.

Such a limited view of those hoary cases would, of course, require a reevaluation of the validity of the doctrine of intergovernmental tax immunities—a doctrine which does not rest upon any specific provisions of the Constitution, but rather upon this Court's concepts of federalism. See *M'Culloch v. Maryland*, *supra*, at 426; *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 487–492 (1939) (Frankfurter, J., concurring); T. R. Powell, *Vagaries and Varieties in Constitutional Interpretation*, c. IV (1956). I have no doubt that Congress could provide (and has provided, see p. 15, *infra*) statutory immunity from state taxation for the federal instrumentalities it may establish. See, e. g., *United States v. City of Detroit*, 355 U. S. 466, 474 (1958); *Maricopa County v. Valley Nat. Bank*, 318 U. S. 357, 361 (1943); *Union Pacific R. Co. v. Peniston*, 18 Wall. 5, 37–38 (1873) (concurring opinion). Given that congressional power, there is little reason for this Court to cling to the view that the Constitution itself makes federal instrumentalities immune from state taxation in the absence of author-

⁴ *Owensboro* might also be viewed simply as prohibiting a franchise tax, i. e., as holding that a State may not condition the privilege to operate within its borders granted to the bank by Congress, by exacting that kind of tax. (Such a tax is permissible under 12 U. S. C. § 548 as amended after *Owensboro*, see *Tradesmens Nat. Bank v. Tax Comm'n*, 309 U. S. 560 (1940).) The taxes in *M'Culloch* and *Osborn*, apart from their discriminatory aspects, might be similarly viewed: the Maryland tax was directly upon the bank's operations, and alternatively upon its privilege to operate within the State; the Ohio tax in *Osborn* was also a condition upon the bank's privilege to transact business there. While the language and holdings of later cases go well beyond that limited view, that view would seem preferable to me to interpreting those constitutional decisions as flatly prohibiting all forms of state taxation, aside from exceptions listed in *M'Culloch*, 4 Wheat., at 436 (see p. 14, *infra*).

izing legislation. The disparate kinds of instrumentalities and forms of state taxation create difficulties for *ad hoc* resolution of the immunity issue by this Court based only upon abstract concepts of federalism. See generally Powell, Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633 (1945); Powell, Remnant of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 757 (1945). As the Court has sometimes realized:

"Wise and flexible adjustment of intergovernmental tax immunity calls for political and economic considerations of the greatest difficulty and delicacy. Such complex problems are ones which Congress is best qualified to resolve." *United States v. City of Detroit*, 335 U. S., at 474.

B. The Court has never indicated any great desire to reconsider *in toto* the doctrine of the constitutional immunity of federal instrumentalities from state taxation. The Court has, however, noted the trend in its decisions toward restricting "the scope of immunity [from taxes] of private persons seeking to clothe themselves with governmental character," *Oklahoma Tax Comm'n v. Texas Co.*, 336 U. S. 342, 352 (1949). The wisdom of that trend counsels, I think, a rejection of the constitutional argument in this case.

As the Court said last Term, "there is no simple test for ascertaining whether an institution is so closely related to governmental activity as to become a tax-immune instrumentality," *Department of Employment v. United States*, 385 U. S. 355, 358-359 (1966) (holding Red Cross immune). Various formulations of the controlling test have been used to determine whether institutions or individuals are immune: whether they "have been so incorporated into the government structure as to become instrumentalities of the United States and thus to enjoy governmental immunity," *United States v. Boyd*, 378 U. S. 39, 48 (1964); whether they "are arms

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of the Government deemed by it essential for the performance of governmental functions," and "are integral parts of [a government department and] . . . share in fulfilling the duties entrusted to it," *Standard Oil Co. v. Johnson*, 316 U. S. 481, 485 (1942) (Army post-exchanges immune); whether they have been so "assimilated by the Government as to become one of its constituent parts," *United States v. Township of Muskegon*, 355 U. S. 484, 486 (1958); and whether the institution is regarded "virtually as an arm of the Government," *Department of Employment v. United States, supra*, at 359-360.

Under those general rubrics, the Court has looked to various specific factors and characteristics to determine the status of the specific institution: whether it is organized for private profit, and whether the Government has retained such control over it so that "it could properly be called a 'servant' of the United States in agency terms," *United States v. Township of Muskegon, supra*, at 486-487; whether it was organized to effectuate a specific governmental program, *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U. S. 95, 102 (1941); whether its ownership, substantially or totally, lies in the Government, *Clallam County v. United States*, 263 U. S. 341, 343 (1923); *Union Pacific R. Co. v. Peniston*, 18 Wall., at 32; whether government officials handle and control its operations, *Standard Oil Co. v. Johnson, supra*; whether its officers or any significant portion of them are appointed by the Government, *Department of Employment v. United States, supra*; compare *Union Pacific R. Co. v. Peniston, supra*; whether the Government gives it significant financial aid, whether it is charged by law with carrying out some of the Government's international commitments, and whether it performs "functions indispensable to the workings" of a governmental unit, *Department of Employment v. United States, supra*, at 359.

Under any of those rubrics and applying the factors listed above—a list not intended to be exhaustive, a national bank cannot be considered a tax-immune federal instrumentality. It is a privately owned corporation existing for the private profit of its shareholders. It performs no significant federal governmental function that is not performed equally by state-chartered banks. Government officials do not run its day-to-day operations nor does the Government have any ownership interest in a national bank.

Appellant points to two factors as leading to the conclusion that national banks are federal instrumentalities: that they "owe their very existence to congressional legislation," and that they are subject to extensive federal regulation. But the fact that institutions "owe their existence to," i. e., are chartered by, the Government, has been definitely rejected as a basis alone for determining they should be tax immune. *Union Pacific R. Co. v. Peniston*, *supra*; cf. *Broad River Power Co. v. Query*, 288 U. S. 178 (1933). Similarly, a whole host of businesses and institutions are subject to extensive federal regulation and that has never been thought to bring them within the scope of the "federal instrumentalities" doctrine. The plain fact is that one could hold that national banks have a constitutional tax-immune status today only by mechanically applying the three seminal cases of *M'Culloch*, *Osborn*, and *Owensboro*. It is instructive, therefore, to examine the functions performed by the national banks involved in those cases.

The Second Bank of the United States, involved in *M'Culloch* and *Osborn*, would clearly be a federal instrumentality under the Court's most recent discussion of the doctrine (*Department of Employment, supra*): the United States owned 20% of its capital stock (the remainder being owned by private persons); the President appointed five of its 25 directors, and the Government,

as a shareholder, participated in the election of the others; the Secretary of the Treasury was required to deposit all of the public funds in the bank, unless he could give reasons to Congress why he should not do so; the bank was required to transmit funds for the United States without charge; the bank issued currency which was established as legal tender for all debts owing to the Government; and the bank clearly acted as the fiscal agent of the Government, handling its foreign exchange transactions. See P. Studenski & H. Kroos, *Financial History of the United States* 83-88, 103-106 (2d ed. 1963); *Federal Reserve System, Banking Studies* 7-8, 18, 39-41 (1941).

Even the national bank involved in *Owensboro* might warrant tax-immune status were it in existence today. It was established pursuant to the banking acts of 1863 and 1864⁵ which were enacted largely to bolster the Union's financial status, shaky because of the Civil War. *Banking Studies, supra*, at 43-46. Most importantly, from the standpoint of analyzing the federal functions such banks served, national banks under the Civil War legislation,⁶ to which national banks today trace their history, had important and significant functions concerning currency. They were authorized to issue currency, printed for them by the Treasury Department, and such currency was established as legal tender for all debts owing to, or payable by, the Government. To insure the stability of the national currency by insuring the stability of the issuing banks, as well as to provide a ready market for the Government, each such national

⁵ Act of February 25, 1863, 12 Stat. 665 ("An Act to provide a national currency . . ."); Act of June 3, 1864, 13 Stat. 99 ("An Act to provide a national currency . . .").

⁶ See n. 5, *supra*; see also revenue acts, Act of March 3, 1865, §§ 6, 7, 13 Stat. 469, 484; Act of July 13, 1866, § 9, 14 Stat. 98, 146.

bank was required to secure its currency by depositing United States bonds with the Treasury Department. *Banking Studies, supra*, 14-16, 41-46; Studenski and Kroos, *supra*, 154-155.

All of this was radically changed with the passage of the Federal Reserve Act of 1913, 38 Stat. 251, as amended, 12 U. S. C. § 221 *et seq.*, and by subsequent developments with respect both to the Federal Reserve System and to national banks. To capsulize those developments greatly, suffice it to say that the Federal Reserve banks (and System) are now the monetary and fiscal agents of the United States. 12 U. S. C. § 391. By 1935, the power of national banks to issue currency had ceased and now Federal Reserve banks are the only banking institutions that can do so. *Banking Studies, supra*, at 240; *Federal Reserve System, The Federal Reserve System: Purpose and Functions* c. X (5th rev. ed. 1967). The diminished importance of national banks as federal functionaries was compensated for by the enactment of legislation designed to make them more competitive with state banks, *e. g.*, branch banking, 44 Stat. 1228-1229 (1927), as amended, 12 U. S. C. § 36 (c); fiduciary powers, 76 Stat. 668 (1962), 12 U. S. C. § 92 (a); rate of interest on loans, 48 Stat. 191 (1933), as amended, 12 U. S. C. § 85; capitalization, 48 Stat. 185 (1933); 12 U. S. C. § 51; and interest on time and savings deposits, 44 Stat. 1224-1225 (1927), 12 U. S. C. § 371.

To be sure, the Federal Reserve System could not function without national banks, which are required to be members therein, 12 U. S. C. § 222, and in that sense they are part and parcel of the establishment and effectuation of the national fiscal and monetary policies. But, in my view, that does not make them sufficiently quasi-public to enjoy the tax-immune status of federal instrumentalities. If that alone were enough, then it would seem that

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state banks which elect to join the Federal Reserve System should also be tax-immune federal instrumentalities.⁷

In any event, there is little difference today between a national bank and its state-chartered competitor: the ownership, control and capital source of each is private; each exists for private profit. More importantly, neither may issue legal tender:

"With the passing of the national bank notes, the United States lost much of the difference between the national banking system and the state banking systems. Except for automatic membership in the Federal Reserve System, different examining boards, and more or less different standards of examination, appraisal and the like, the main point of differentiation between the national banking system and any [state] . . . banking system . . . was formerly the privilege of currency issue." J. Paris, *Monetary Policies of the United States, 1932-1938*, at 96 (1938).

Today the national banks perform no significant fiscal services to the Federal Government not performed by their state competitors. Any federally insured bank, state or national, may be a government depository. 12 U. S. C. § 265. The principal checking accounts of the Government are carried today, not by national banks, but by the Federal Reserve banks. When a new issue of government securities is offered, the Federal Reserve banks receive the applications of purchasers. When government securities are to be redeemed or exchanged, the transactions are handled by the Federal Reserve banks. Those banks administer for the Treasury the tax and loan

⁷ As of December 31, 1966, membership in the Federal Reserve System was composed of 1,351 state-chartered, and 4,799 national, banks. *Federal Reserve System: Purposes and Functions, supra*, at 24-25.

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deposit accounts of the banks in their respective district. See *The Federal Reserve System: Purposes and Functions, supra*, at 225-234, 274-277; *Banking Studies, supra*, 260-265.

In *Graves v. New York ex rel. O'Keefe*, 306 U. S., at 483, Mr. Justice Stone wrote for the Court:

"[T]he implied immunity of one government and its agencies from taxation by the other should, as a principle of constitutional construction, be narrowly restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed."⁸

That is precisely the situation here; I would heed those words and hold that national banks, today, are not immune from nondiscriminatory state taxation as federal instrumentalities.⁹ I might also add that I am a bit mystified that under the Court's decisions in this field the Federal Government in practical effect must pay a state tax in dealing with its contractors (who pass the tax on to the Government), see, e. g., *Alabama v. King & Boozer*, 314 U. S. 1 (1941), but that a national bank, a private profit-making corporation, is constitutionally immune from state taxation.

⁸ Accord, *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 580 (1931) (Stone, J., dissenting).

⁹ Compare the rejection of a national bank's contention that it, as a federal instrumentality, should be exempt from the federal labor laws, *NLRB v. Bank of America*, 130 F. 2d 624, 627 (C. A. 9th Cir. 1942) (footnote omitted):

"It is a privately owned corporation, privately managed and operated in the interests of its stockholders. . . . The United States did not create it, but has merely enabled it to be created. . . ."

II.

The Court holds that 12 U. S. C. § 548, *ante*, p. 2, n. 4, "was intended to prescribe the only ways in which the States can tax national banks." *Ante*, p. 5. I would be less than candid not to acknowledge that that holding has the virtue of being supported by substantial precedent. But that seems to me to be its only virtue. That interpretation of § 548 has its judicial origin in the *Owensboro* case. Given the constitutional premise of *Owensboro*, that interpretation would be quite clearly correct. But since I reject the constitutional premise so far as national banks today are concerned, it seems to me § 548 ought to be examined freshly, for the "immunity formerly said to rest on constitutional implication [should not] . . . now be resurrected in the form of statutory implication." *Oklahoma Tax Comm'n v. United States*, 319 U. S. 598, 604 (1943).

Section 548 expressly mentions four specified types of taxes: those on national bank shares, on dividends on shares in the hands of stockholders, on the income of the bank, and taxes "according to or measured by" a bank's income. It provides that the imposition of any one of the four listed taxes "shall be in lieu of the others." That statement, together with language of the section omitted in the Court's note as not pertinent (*ante*, p. 3, n. 4),¹⁰

¹⁰ The relevant omitted portions of § 548 read:

"1. (a) . . .

"(b) In the case of a tax on said shares, the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided*, That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made

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makes clear that the purpose of the section was to insure the competitive equality of the banks with other businesses by preventing the bank or its shareholders from being subjected to more than one of the four enumerated types of taxes, other than real property taxes, so as to prevent multiple taxation of the same income, unless the States taxed the income of other businesses in similar multiple fashion. See 12 U. S. C. §§ 548 (1) (b), (c), and (d), *supra*, n. 10. All that the majority can point to in the legislative history of § 548 is that the

in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

"(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate, assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: *Provided, however,* That a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

"(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"2. The shares of any national banking association owned by nonresidents of any State shall be taxed by the taxing district or by the State where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders."

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Congress was well aware of *M'Culloch v. Maryland*. And that decision specifically stated the following:

"This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State."

(4 Wheat., at 436.)

I view § 548 as congressional delineation of those areas of state taxation of national banks permitted by the *M'Culloch* decision itself. I would hold that the section was "merely designed to insure that the inherent taxing powers which were recognized in" that case—"e. g., the power to tax the real property of the banks as well as the privately owned shares—be exercised in a non-discriminatory manner." *Liberty Nat. Bank v. Buscaglia*, 21 N. Y. 2d 357, —, 235 N. E. 2d 101, 108 (1968). As this Court said in *Tradesmens Nat. Bank v. Oklahoma Tax Comm'n*, 309 U. S. 560, 567 (1940), "the various restrictions [§ 548] . . . placed on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class."

Moreover, whatever else may be said of the statute, it most assuredly does not provide specifically that it is the sole measure of the State's power of taxation. One could argue that, given the state of constitutional law as it then existed, Congress saw no need to say specifically in § 548 that national banks were immune from state taxation except as that section permitted. Aside from the misreading of *M'Culloch* that such a

view entails, the constitutional immunity of federal instrumentalities was just as plain when Congress provided statutory immunity for such agencies as, e. g., the Federal Reserve banks, 38 Stat. 258 (1913), 12 U. S. C. § 531; Federal land banks, 39 Stat. 380 (1916), 12 U. S. C. § 931; many other federal banking institutions;¹¹ the Reconstruction Finance Corporation, 47 Stat. 9-10 (1932), 15 U. S. C. § 607; and the Public Housing Administration, 50 Stat. 890 (1937), 42 U. S. C. § 1405 (e), and a host of government-owned corporations.¹²

It is not without relevance in construing § 548, it seems to me, that the kinds of state taxes here involved did not exist at the time the section was adopted and were not a significant factor in the raising of state revenue until the early 1930's, subsequent to the last amendment of § 548 in 1926. See generally H. R. Rep. No. 565, 89th Cong., 1st Sess. 608 (1965). I think we should be reluctant to interpret a statute having such narrow scope as § 548 in terms as encompassing such a broad prohibitory application. It seems to me that we would do far better to recognize the Constitution does not prohibit nondiscriminatory state taxation of national banks, and that § 548 limits only the kinds of taxes specifically set forth therein. Only in that way is Congress free to re-evaluate the situation. That is, so far as construing § 548 is concerned, in practical effect the issue is who shall bear the burden of seeking congressional action. I would put the burden where it ought to be, namely, on the private profitmaking corpora-

¹¹ E. g., federal intermediate credit banks, 12 U. S. C. § 1111; Federal Home Loan Bank, 12 U. S. C. § 1433; federal savings and loan associations, 12 U. S. C. § 1484 (h).

¹² E. g., Federal Deposit Insurance Corp., 12 U. S. C. § 1825. See Government Corporation Control Act of 1945, 59 Stat. 597, as amended, 31 U. S. C. § 841 *et seq.*

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tion that seeks exemption from nondiscriminatory state taxation.

Finally, a major national banking policy has been to foster competitive equality of national and state banks. See, e. g., *First Nat. Bank v. Walker Bank*, 385 U. S. 252 (1966); *Lewis v. Fidelity & Deposit Co.*, 292 U. S. 559 (1934). We ought, if other considerations are not decisive, to promote rather than retard that strong policy.

For the reasons stated, I would affirm.

MR. JUSTICE HARLAN: In addition to the reasons given in my Brother MARSHALL's opinion, which I have joined; I would affirm the judgment below on the basis of that part of Justice Reardon's opinion for the Supreme Judicial Court of Massachusetts which upheld the application of Massachusetts' use tax to national banks. See — Mass. —, —, 229 N. E. 2d 245, 251-260.

